UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

H&M INTERNATIONAL TRANSPORATION, INC.

and **Case 05-CA-241380**

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO

and

TEAMSTERS LOCAL UNION NO. 822, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PARTY IN INTEREST

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DECISION

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. This case considers whether an employer may lawfully recognize a labor agent that did not represent its predecessor's employees and refuse to hire a majority of the predecessor's unionized employees. I find that Respondent H&M International Transportation, Inc. (H&M) is a successor that violated Section 8(a)(3) by failing and refusing to hire a number of the predecessor's employees. I also find H&M recognized Party in Interest Teamsters Local Union No. 822, affiliated with the International Brotherhood of Teamsters (Teamsters Local 822) and subsequently applying terms and conditions of employment to from a collective-bargaining agreement it negotiated with Teamsters Local 822. In doing so, H&M also violated Section 8(a)(2) and (5).

STATEMENT OF THE CASE

The amended complaint alleges that H&M is a successor to ITS Technologies at Norfolk Yard and failed to hire a majority of the ITS workforce because they recently unionized and were represented by Charging Party International Longshoremen's Uni

Local 1970, AFL-CIO (ILA Local 1970). One of H&M's managers allegedly told former ITemployees that they would not be hired because they supported the union while working for ITS, in violation of Section 8(a)(1). The complaint also alleges that H&M unlawfully assisted Teamsters Local 822, which included assisting Teamsters Local 822 with obtaining cards, recognizing it and entering into a collective-bargaining agreement, in violation of Section 8(a)(2). H&M allegedly refused to recognize and bargain with ILA Local 1970 as violations of Section 8(a)(5). H&M denies all material allegations.

After careful review of the transcript,[1] exhibits and briefs, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION AND UNION STATUS

Respondent H&M is with an office in H&M's corporate office is located in Iselin, New Jersey and places of business in Chicago, Illinois, Croxton, New Jersey and Chesapeake, Virginia including (Norfolk Yard), Virginia. It performs intermodal railroad terminal services. In the 12-month period ending December 31, 2020, Respondent performed services valued in excess of $50,000 in states other than the State of Virginia. H&M admits, and I find, that Respondent H&M is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

I find that Teamsters Local 822 and ILA Local 1970 are labor organizations within the meaning of Section 2(5) of the Act.

[1] The transcript identifies the person responding to Mr. Fitzgerald's request for a Jencks statement as myself; the person responding should be Ms. Eitzen. (Tr. 1359.) At Tr. 1657, L. 22, the transcript should reflect Mr. Fitzgerald requesting a "Jencks" statement, not a joint statement. The transcript should identify Esders, not Fitzgerald, as the questioner at Tr. 1665, L. 5. At Tr. 1689, L. 16, the record phonetically spells "unionanimous" instead of "union animus." At Tr. 2058, the judge's question to Connors should state: ". . . at what point did you discover that the employees at that facility were represented by the ILA?"

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622. When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

II. PROCEDURAL HISTORY

On May 13, 2019 International Longshoremen's Association Local 1970 (ILA Local 1970) filed Charge 5-CA-241380, which was served by regular mail on May 14, 2019 upon H&M. The first amended charge was filed on July 9, 2019 and served by regular mail upon H&M on July 10, 2019. The second amended charge was filed on November 12, 2019 and served upon H&M by regular mail on November 14, 2019. On June 11, 2020, the Regional Director issued and served a Complaint and Notice of Hearing based upon the charges. On June 25, 2020, Respondent electronically served its Answer to the Complaint and Notice of Hearing.

This hearing was held via Zoom videoconference technology[3] on 11 days, starting January 25, 2021 and ending on March 23, 2021.[4] On the first day of hearing, Respondent requested that the complaint be dismissed or the proceedings should be stayed after President Biden discharged Peter Robb from his duties as General Counsel 5 days before the hearing opened. I denied the motion. Respondent then filed with the Board for special permission to appeal my ruling. On March 1, 2021, the Board denied Respondent's request for permission to file a special appeal and dismissed Respondent's request for an emergency stay of hearing as moot.

Respondent included General Counsel Robb's termination as an affirmative defense in its First Amended Answer. Subsequently, the Board ruled arguendo, that assuming the Board has jurisdiction to review the President's removal of the former General Counsel, the Board determined that it would not effectuate the policies of the Act to exercise this jurisdiction. See *National Assoc. of Broadcast Employees and Technicians – the Broadcasting and Cable Television Workers Sector of the CWA, AFL-CIO, Local 51*, 370 NLRB No. 114, slip op. at 2 (April 30, 2021). Following the Board's direction, I withhold any ruling on whether the hearing moved forward improvidently.[5]
On February 23, 2021, Acting General Counsel submitted a written motion to amend the

[3] The technological challenges in this hearing included: a number of us endured the screen freezing or getting thrown out; one attorney's computer began failing and required replacement; lost audio connections; interruptions with telephone calls on witnesses' cellular telephones while they were using the telephone for the Zoom calls; connectivity issues; and other sundry interruptions related to technologic glitches. See, e.g., Transcript Volume 10.

[4] I adhere to my ruling denying H&M's objection to holding the hearing via Zoom videoconference platform, which arose only after the hearing opened. H&M's brief makes no mention of this ruling. No objections had been made to proceeding on Zoom until the hearing opened. Before that time, Respondent participated in conference calls in which use of Zoom was discussed. I issued a Zoom order and H&M, with all parties, participated in a Zoom practice call. The hearing took place during the COVID-19 pandemic, which constitutes extraordinary and compelling circumstances that require avoiding travel, social distancing and additional restrictions. As of January 24, 2021, for the state of Virginia, the positivity rate for COVID was 17%; the seven-day moving averages were 4780 cases, with 52 days per day and 278 hospitalized. Vaccination efforts in Virginia began after January 1, 2021. See Johns Hopkins Coronovirus Resources Center, www.coronavirus.jhu.edu/region/us/virginia. These challenges with COVID constitute compelling circumstances. *William Beaumont Hospital*, 370 NLRB No. 9 (2020).

[5] A recent district court ruling in a 10(j) case determined that the plain language of the Act permitted the President to relieve General Counsel Robb of his position without the same process required for Board members. *Goonan v. Amerinox Processing, Inc.,*1:21-cv-11773-NLH-KMW, 2021 WL 2948052, slip op. at 14 (D.N.J.July 14, 2021). General Counsel contends that *Amerinox* and recent Supreme Court precedent, should be sufficient for the Board to decide this issue. See *Collins v. Yellin*, _ U.S. _, 141 S.Ct. 1761, 1782-1783 (2021).

First Amended Complaint. The amendments included spelling corrections of names, one allegation regarding an alleged discriminatee limiting the dates in which Respondent H&M refused to hire him, and added the following allegations:

> 12(a) From about January 17, 2019 to about January 23, 2019, Respondent, by Jesse DeGroot, gave assistance and support to Teamsters Local 822 by:
>
> (i) Urging Respondent's employees to sign Applications and Notice for Member for Teamsters Local 822; and
>
> (ii) Giving Teamsters Local 822 unfettered access to Respondent's employees at the hotel where Respondent had arranged for the employees to stay while they were in Virginia.

On March 1, 2021, the same day hearing resumed, Respondent H&M filed its Opposition to the Acting General Counsel's Motion to Amend. The majority of Respondent's argument relied on its characterization that the Acting General Counsel had no authority to pursue the complaint based on the allegation that Robb was unlawfully termination. However, it also included an argument that the new allegations are outside the 6-month statute of limitations set forth in Section 10(b) of the Act. Respondent's case in chief started on March 4, 2021, giving H&M from at least February 23 to March 4 to prepare its case in response; further the allegations were based upon testimony previously adduced early in the hearing about DeGroot's presence during the Teamsters Local 822 solicitation of cards. On the record, I granted Acting General Counsel's[6] motion to amend.

III. BACKGROUND

A. Employer History at the Norfolk Portlock Intermodal Yard

Over the years, Norfolk Southern Railroad (Norfolk Southern) contracted work at the Norfolk Portlock Intermodal Yard (Norfolk Yard) consecutively to certain firms. The work for which Norfolk Southern contracts is moving shipping containers on and off the Norfolk Southern trains.

In the mid-2000s, the work was performed by Ted Vance Minority (TVM) employees. Caliber Intermodal was the contractor from about 2010 to 2016. Following Caliber, ITS took over the work at Norfolk Yard. Respondent H&M took over on January 23, 2019.

The ITS and H&M terminal manager was Anthony Lee until Lee's death in April 2019. The operations manager during that time was Leander Barrow. (Tr. 63.)[7] After Lee's death, H&M promoted Barrow to terminal manager. At ITS and H&M, Juanita Williams worked in the office and handled human resources matters.

[6] On July 23, 2021, Jennifer Abruzzo was sworn in as General Counsel. Hereafter, I shall refer to Acting General Counsel as General Counsel.

[7] Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. The following abbreviations are used in this decision: Tr. for transcript; R. Exh. for Respondent H&M exhibit; GC Exh. for General Counsel exhibit; R. Br. for employer H&M brief; and, GC Br. for General Counsel brief.

B. Employee Duties Remained Essentially Unchanged for Years

Norfolk Yard employees' duties had little to no change between the prior subcontractors, including the change from ITS to H&M. (See, e.g., Tr. 1712, 1836-1854, 2073-2074.)[8] The Norfolk Yard had 3 train tracks for Norfolk Southern trains loaded with containers on flatbed rail cars. Norfolk Southern contracts certain work at the yard for loading and unloading containers, checking trucks with containers in and out of the yard, and maintaining certain equipment. Norfolk Southern determines the volume of work and schedules when trains are supposed to arrive and depart. The contractor's employees work to ensure each train is unloaded and loaded to the specifications of Norfolk Southern's train schedules.

The contracted work at the Norfolk Yard involved removing containers from scheduled Norfolk Southern trains and placing the containers on chassis. (Tr. 275.) Conversely, the work also involved replacing containers on the train cars. Some of the work is measured in lifts, also known as 20-foot equivalents, or the number of containers. The number of lifts than can be performed in an hour determines the number of employees needed. The trains may be stacked 2 containers high, and up to 1500 to 15,000 feet long. (Tr. 607, 1702.) A 1500-foot train typically holds 30 to 50 containers. (Tr. 1703.) The team can unload a train in about 45 minutes, assuming that 3 yard jockey drivers are working. (Tr. 616.) Barrow estimates it takes 1 to 1 ½ hours to unload a 1500-foot train. (Tr. 1703-1704.) Unloading a 15,000-foot train, with up to 300 containers, takes 3 days to unload. (Tr. 1704.) Reloading a train takes longer. (Tr. 616.) Before the personnel can unload or load the containers, the terminal manager marks the track with flags and locks a switch in place so that no other train enters the track where employees are working. (Tr. 1705-1706.)

The employees needed to accomplish these tasks usually are 1 crane operator, 2 groundsmen, and the yard jockey drivers, sometimes also called hostler drivers, who bring chassis to the train. The crane operators logs into his computer to identify which containers are on each train car. (Tr. 605.) Norfolk Southern supplies the crane used to remove the containers. (Tr. 610.) The groundsmen, on ladders and using a hammer to break the box connectors (some called them zip ties), unlock and lock the containers on each rail car. They also install interbox connectors in each corner to prepare for lifting the container. (Tr. 1048, 1092, 1378-1379.) The groundsmen take approximate 1-2 minutes to unlock each container.

The groundsmen step away from the unlocked containers to allow the crane operator, using a side lifting crane, to remove the container from the train car. While the crane operator approaches the container to be lifted, the groundsmen continue their work with other containers. The crane operator then places it on a chassis that a driver, sometimes called a yard jockey driver or a hostler driver, places with his yard truck. This portion of the process takes approximately 3 minutes per container. (Tr. 605, 1704, 1709-1710.) The crane operator enters the container and chassis information in a computer, which sends a message through Norfolk Southern's system for pickup. (Tr. 1715-1716.) In a process that take approximately 5-6 minutes, the driver takes the container on the chassis, parks the chassis and container in the outbound area of yard in an assigned spot, and unhooks it. The driver then hooks on an empty chassis and brings it back to the train

[8] Barrow was unfamiliar with the duties of the mechanics at ITS, so he had no frame of reference for those comparisons. (Tr. 1749, 1855-1856.)

and the crane operator for the next container. (Tr. 1712-1713.) The contractor provides its own hostler trucks, which are also called yard jockeys. (Tr. 1313.) The terminal manager releases the track when the work is complete so that Norfolk Southern's trains can enter. (Tr. 1706-1707.)

Trucks pulling chassis with containers enter and leave the Norfolk Yard through specific entrance and exit gates, which are manned by the contractor's gate inspectors, also called gate clerks. The gate clerks check trucks in and out. The gate clerks use handheld computers, which tie into the Norfolk Southern Railway's computer, to enter their specific log-in code each day and obtain the information necessary to determine what should be loaded and unloaded, including locating chassis and containers. (Tr. 642, 983, 1717.) For a truck entering the property, the gate clerk checks the numbers on the container and chassis and whether it has any billing needs. The gate clerk also inspects the chassis, container and tires for damages. (Tr. 676.) The gate clerks tell entering drivers where to locate the container, on the chassis, in the yard. (Tr. 679.) For a truck leaving the yard, gate clerks ensure that the pick-up number on the containers and chassis are correct. They inspect the truck, container and chassis and make any notes in the handheld of any damage. (Tr. 642, 676.) The gate clerk's inspection includes walking around the truck and tapping on the tires to ensure tires are not flat. (Tr. 676.) If a truck leaves without a trailer, the gate clerk makes a note in the handheld computer as a "bobtail." (Tr. 679, 1717.) The gate clerk who arrives first each day in the Norfolk Yard also starts taking inventory of all the containers within the yard. (Tr. 983.) During the day, if gate clerks had problems, they take issues to either the terminal manager or operations manager, depending on who was on duty. (Tr. 76-77.)

At multiple times throughout each workday, the employees receive or deliver to the office their paperwork about completion of loading containers onto rail cars or obtain new information about what containers to load on the rail cars. (Tr. 486, 824.) If the paperwork is not ready for the employees working on the trains, the employees wait in the break room or the offices where the managers and gate clerks worked. (Tr. 489-490, 823.) Either of the managers could give the paperwork to the employees. (Tr. 823.)

The building next to the office houses the mechanics, who perform routine maintenance and repairs. A dock building stored the crane and chassis parts. (Tr. 1004.) Maintenance employees kept inventory for parts. The maintenance operations (or sometimes chassis/container) mechanics repair chassis while lift mechanics (also called power mechanics) maintain and repair the cranes. The chassis repairs included replacing tires, fixing air brakes and bumpers, and lights and ensuring that the trailer lights worked correctly. They inspected the chassis and looked for damage. The chassis belong to Norfolk Southern. (Tr. 1076-1077, 1098, 1148.) Trucks are also repaired in the maintenance building. The mechanics use the forklift to move parts in the maintenance shop. The mechanics would go to the office to provide inventories to Juanita Williams or sometimes see management about other issues. (Tr. 1006.) The mechanics work weekends only when a major repair is needed.

The break room is accessible to management and all employees for their break times or to get a snack. (Tr. 490, 649.) Additionally, when the crews are not working, they spend their time in the break room. (Tr. 824.) The vending machines are located in the break room. (Tr. 490.) The mechanics also use the break room to obtain items from the vending machines and sometimes eat lunch there. (Tr. 1005.)

For all contractors working the Norfolk Yard, including H&M, employees frequently cover other jobs for which they were qualified. For example, a crane operator could work as a hostler driver or groundsman, depending upon who was scheduled or if one worker wanted to trade off.

At the time of hearing, H&M operated the Norfolk Yard with 1 crane operator, 2 groundsmen and 3 or 4 yard jockeys. (Tr. 1714, 1731.) H&M employed 5 gate clerks, 3 of whom work at the same time. (Tr. 1716.) Each day H&M unloaded 1 inbound train and prepares 2 outbound trains. (Tr. 1729.)

C. Most Intermodal Employees at Norfolk Yard Were Long-Term

Three known contractors preceded H&M in the operations at the Norfolk Yard. TVM was present from at least 1987. TVM was followed by Caliber Intermodal, which was the contractor who performed the work as stated above until about 2015. Between 2015 and January 23, 2019, the contractor was ITS. ITS hired almost all of the employees who performed work for Caliber. The location of the managers' offices were unchanged and the managers remained Terminal Manager Anthony Lee and Operations Manager Leander Barrow. (Tr. 648.)

The employees hired by TVM included Mark Keating, Michelle Clarke, Carlos Jones, Earl Smith and Michael McManus. Keating's last position with ITS was a mechanic and a hostler driver, making $22.00 per hour.[9] (GC Exh. 12.) Clarke's last position with ITS was as a gate clerk, the same position she held since at least 2004. She earned $13.50 per hour. (GC Exh. 13.) Jones initially worked as a gate clerk for 2 years, then learned to perform groundsman duties. (Tr. 805-806.) He worked as a groundsman for about 2 years and then learned to drive the yard jockey. (Tr. 806-807.) Eventually he became a crane operator. (Tr. 807.) He had a 1-year gap in employment between Caliber and ITS due to not having a driver's license.[10] Earl Smith, hired by TVM in 2000, subsequently worked for Caliber and ITS as a hostler truck driver. His last rate of pay for ITS was $15.10 per hour. (Tr. 935-937; GC Exh. 20 at 126.) It was no secret at Norfolk Yard that Smith worked with ILA Local 1248 for 30 years. (Tr. 942.) McManus was hired by TVM in 1987 as a gate keeper and groundsman. He consecutively worked for Caliber and ITS. In total, he worked at Norfolk Yard for 31 years. (Tr. 1091.) He worked his way up to a lead chassis mechanic at ITS and chassis inventory keeper, earning $19.26 per hour. (Tr. 1092; GC Exh. 22 at 140.)

In 2006, Caliber hired Christopher Lucas as a hostler truck driver; he then worked for ITS as a terminal lift operator, earning $16.78 by the end of his employment. (GC Exh. 18 at 112.) Lucas worked at the Norfolk Yard for 13 years. In his last year with ITS, Lucas became a crane operator.

Darryl Halsey started working at the Norfolk Yard in 2006 as a groundsman at Caliber, then became a hostler driver about 1 year later. As a hostler driver, he drove the yard jockey, which backs up to containers and takes them to the train. (Tr. 555- 557.) He eventually became a crane operator for Caliber, offloading and loading containers on to

[9] Mark Keating was a crane mechanic who was demoted to driving the yard truck. (Tr. 1101.) General Counsel's brief states Keating died after the hearing closed.

[10] Barrow testified that Jones came and went throughout his employment; however, Jones's application does not support Barrow's testimony. (GC Exh. 16 at 98.)

trains. The equipment used was a side loader crane. (Tr. 557.) Halsey's pay at ITS as a crane operator was $17.80 per hour. (GC Exh. 15 at 91.) At the time of hearing, he was working for H&M.

Vernon Cuffee was hired by Caliber about 2008 as a driver and subsequent worked for ITS. His last pay at ITS was $16.75 per hour. (GC Exh. 14 at 84.) Carlos Jones was hired by Caliber Intermodal in 2009 and worked as a crane operator and hostler driver. He began employment with ITS in June 2015 in the same jobs with the pay rate of $17.80 per hour. (GC Exh. 16 at 98.)[11] Caliber hired Ron Spencer as a gate clerk in 2013; he moved to ITS as a gate clerk and groundsman with a final hourly pay rate of $13.51. (GC Exh. 21.) When Caliber hired him, he received training on the handheld computers for approximately 1-2 weeks. (Tr. 62.) He also received training in groundsman duties while at Caliber from Mike McManus, a fellow employee, on how to unlock and lock containers and where to stand. (Tr. 63.) In January 2019, his rate of pay was $14.00 per hour. If he worked weekends, he would work groundsman duties. (Tr. 35-36.) Caliber hired Rayeon Ricks Jordan[12] as a groundsman in 2014; while at ITS he worked at as trailer mechanic at a pay rate of $16.22 per hour. (GC Exh. 17 at 105.)

ITS also hired Ernest Perry as a "terminal operator" in 2017 with a rate of pay at $11.52 per hour. (GC. Exh. 19 at 119.)

Also working in the office was Alan Young, who was also a gate clerk, who also made sure the track was secure. (Tr. 648, 824-825.) Young testified that he also gave the paperwork for each train's unloading to employees in the office, such as David Wade, Darryl Halsey, or anyone that was a yard jockey. (Tr. 986.) Young also testified that this work was no different than at Caliber. Young also performed any managerial duties if Lee or Barrow was not available. (Tr. 1005.) If Young and Barrow were not available, Michelle Clarke would check inventory. (Tr. 1885.) However, Young was known to have problems with the outside drivers who came to pick up and drop off containers.

ITS employed 4 mechanics. (Tr. 882). All mechanics worked in the shop. The chassis and truck mechanics were Mike McManus, Jermaine Collins and Rayeon Jordan. (Tr. 488.) Jermaine Collins became an assistant crane mechanic, leaving McManus and Jordan to work on chassis. (Tr. 1100.) Marcus Hunter worked as a power/crane mechanic but not as chassis mechanic. (Tr. 2072-2073.) Hunter had transferred from ITS's Houston location to work at the Norfolk Yard. (Tr. 2071-2072.)

While at ITS, employee shifts began at 4 a.m. to 5 a.m., depending on the time trains would arrive for offloading. Manager Lee notified employees when start times varied. (Tr. 563-564.) The first gate clerk scheduled at 7 a.m. usually was Michelle Clarke, so she would be in charge of inventorying the containers in the yard. (Tr. 984, per Young.) While at ITS, Terminal Manager Anthony Lee arrived about 8 a.m. and then conducted daily safety meetings about 8:30 a.m. (Tr. 988.) Lee also had meetings at 9 a.m. with ITS by telephone. Operations Manager Barrow arrived usually at 12 noon and stayed until the end of the day. (Tr. 988.) Barrow oversaw load planning, the yard jockeys and the gate clerks. (Tr. 1748.) Lee oversaw the maintenance operations. (Tr. 1748.) Until Lee

[11] Jones explained that he had a year-long gap in his employment between Caliber and ITS because he did not have a valid driver's license, which was required for his job.
[12] Rayeon's name is misspelled as "Ray Young" at Tr. 285.

arrived Young first testified that he acted as supervisor, then as head gate clerk. He spent the first 3 to 4 hours of the day in the office until the first gate inspector arrived and the remaining time was spent in the truck. (Tr. 989.)

IV. UNIONIZATION EFFORTS AT THE NORFOLK YARD IN FALL 2018

A. ITS Employees Talk to ILA Local 1970 about Organizing

In mid-September 2018, Michael McManus approached ILA and submitted a package for employment. (Tr. 1008.)[13] About 4 days later, he received a telephone call from ILA Local 1970 President Kevin Basnight, who was interested in meeting him and asked if anyone else was interested. (Tr. 1109, 1625.) Basnight, and the organizer for ILA Local 1970, Kevin Wallace, met with McManus in the Norfolk Yard's parking lot. (Tr. 1009-1110.)

McManus eventually told a number of fellow employees, except Marcus Hunter, about organizing with ILA Local 1970. (Tr. 37-38, 491, 652, 1112-1113.) On the same day that the ILA officials came to the Norfolk Yard, McManus discussed unionization with Carlos Jones, at the 20th row of the facility, which is the back row towards, the street. (Tr. 827-828, 895, 1111-1112.) Carlos Jones was the first person who told Darryl Halsey about the organizing efforts after Jones and McManus attended a meeting with ILA Local 1970. (Tr. 566.) Jones also spoke to Michelle Clarke about ILA Local 1970. (Tr. 652.) McManus and Jones apprised his fellow employees verbally or via text message about further meetings with ILA Local 1970. ILA Local 1970 conducted several meetings for the employees, first in a restaurant and the remainder in the union hall. Around September 2018, McManus spoke with Rayeon Jordan about unionization while they were alone in the mechanics area. (Tr. 1053.) McManus talked to Vernon Cuffee outside the breakroom while they were alone. (Tr. 1277.)

McManus served as the point of contact with Organizer Wallace to find out when ILA Local 1970 would schedule meetings for the ITS employees. McManus then relayed the information to the employees. (Tr. 1114.) A number of employees attended a first meeting in a pizzeria with the ILA officials. (Tr. 828, 1628-1629.) At the first meeting at the pizzeria and every subsequent meeting, the ILA circulated a sign-in sheet for the employees. (GC Exh. 2.)

Meetings continued at the union hall, where employees signed in for each meeting. Carlos Jones attended 6 meetings in fall 2018 with ILA, including those held at the union hall. (Tr. 829.) Ron Spencer attended about 5 meetings at the ILA Hall. Darryl Halsey attended 4 or 5 meetings. (Tr. 567.) Rayeon Jordan attended about 3 or 4 meetings at the union hall, signing in each time. (Tr. 1053-1054.) Vernon Cuffee attended 5 meetings. (Tr. 1278.) Carlos Jones, Christopher Lucas, Michelle Clarke, Jermaine Collins, Mark Keating, Earl Smith, and Ernest Perry also attended meetings. Employees also talked among themselves in the parking lot of the union hall after the meetings.

McManus also talked to gate clerk Alan Young about unionization. McManus testified that Young initially was receptive but then did ask questions. (Tr. 1113; 999-

[13] Before contacting the union, McManus first discussed ILA with Earl Smith. Smith worked under ILA Local 1248 before his employment at the Norfolk Yard. (Tr. 942-943.)

1000.) Young testified, somewhat contradictorily, that he did not tell anyone at ITS that he was not attending a union meeting, that he was ever questioned about attending meetings and did not tell anyone that he did not attend the meetings. (Tr. 1001.)

ILA Local 1970 President Basnight provided some employees "pledge" cards to sign to request representation. (Tr. 1632.) McManus solicited cards from a number of employees. (Tr. 1152.) A large number of the employees decided that they wanted an election to determine whether ILA Local 1970 would be their bargaining representative. (Tr. 494.) Among those employees signing cards were Spencer, Jones, Cuffee, Halsey, Clarke and Jordan. (Tr. 39, 830, 1280, 570, 654, 1055.) All completed cards ultimately were returned to Organizer Wallace. (Tr. 1116.)

B. Before the Election, Manager Anthony Lee Expresses His Displeasure About Unionization Efforts to a Number of Employees

In October 2018 Lee learned of the unionization efforts. He shared this knowledge with Operations Manager Barrow and asked Barrow if he had any knowledge of the employees' union activities. Barrow told him he had not heard anything. Lee told Barrow that they were not guaranteed a job if the employees unionized and feared the managers would lose their jobs. Lee also told Barrow that ITS could leave the terminal. (Tr. 1779-1781.)

1. Manager Lee confronts McManus about the unionization efforts

McManus usually arrived at work about 6:30 a.m., obtained his paperwork, inspected the trucks. At about 7 a.m., McManus provided a safety briefing to the other mechanics. Manager Lee notified McManus by text of the safety discussion topic. (Tr. 1099-1100.) Lee sometimes called McManus as early as 4:30 a.m. (Tr. 1007.) He worked Monday through Friday, usually ending his shifts at 2:30 p.m. (Tr. 1007.) On Friday, October 12, 2018, McManus took the day off.

On October 12, 2018, about 10 a.m., Lee called McManus's personal phone and said he received a letter that ILA wanted to represent employees at the Norfolk Yard. (Tr. 1116-1118.) McManus replied, "[W]e contacted them." (Tr. 1118.) Lee asked why he did so and then said McManus was going to get everybody, all management fired. Lee was cursing and hanging up, then called McManus again. Lee said McManus ruined everything, fucked everything up, McManus was going to get him and everyone else fired, and that he shouldn't have done it. (Tr. 1118.)

Lee called about 6 to 8 more times, saying the same as before, and adding that McManus should have come to him first and he shouldn't have done it. (Tr. 1119.) McManus told Lee that the employees wanted ILA to represent them because it would be better than what they had. (Tr. 1120.)

On Saturday October 13, 2018 and Sunday October 14, Lee sent McManus a series of 3 texts, to which McManus did not reply. Lee's company phone number was in McManus's phone and came up on the screen as Tony Lee. McManus took a screen shot of the texts.

Lee's first text message, at 6:03 p.m. on October 13, said: "Topic of the week how not to screw over a friend." A minute later, Lee sent a text: "Daughters tuition 2400 per semester." On Sunday, October 14, at 7:18 a.m., Lee sent the text: "Or so called friend." (Tr. 1123-1124, 1127-1128; GC Exh. 23.)

On Monday, October 15, 2018, McManus was working with a new employee. Lee came into the mechanics shop and told McManus that he had lost his job and everyone else's. Lee was tense, in a defensive stance with his fists clenched. Lee angrily called McManus a Judas, told him to go to hell, and said, "Fuck you." Lee also called McManus an asshole. (Tr. 1128-1129.) Before this time, Lee had not thrown slurs at McManus. (Tr. 1129-1130.) McManus told Lee to calm down. (Tr. 1129.) Lee jumped in his car and drove to the interchange office. (Tr. 1130.) After Lee's October 15 outburst to McManus, Lee daily found McManus when he was alone and repeated the same slurs. (Tr. 1130.)

On October 17, 2018, ITS notified Norfolk Southern that it was giving its 90-day notice to quit as the contractor at the Norfolk Yard. (GC Exh. 24.)

2. Manager Lee and employee Alan Young

About a week after an ILA official visited the Norfolk Yard, Manager Lee received some form of notice from ITS about the union. Lee talked to Young about it in a conversation outside of the office. Lee told Young he was not happy that everyone knew that the "union was coming and he didn't." Lee was upset because he thought everyone on the Yard were his friends. (Tr. 1003-1004.) Young denied that Lee cursed in the conversation. (Tr. 1005.)

Before the election, Lee also told Young that ITS would leave if the employees unionized. (Tr. 1006.) During that conversation Young told Lee that he planned on voting against the Union. (Tr. 1042.) Young denied that Lee ever told him that he was concerned about losing his job or that he might have a hard time paying his daughter's tuition, because Lee never shared his personal life with him. (Tr. 1007.) In another conversation, Lee said, "[T]he wages that the Union were going to pay us were going to be too much for ITS and ITS wasn't going to pay it . . . That's why we're there, to do the job cheaply and not be a union." Lee never said that ITS told him that. (Tr. 1007-1008.)

Young testified that Barrow also told him that if the union "came in," ITS would leave. (Tr. 1007.) During that conversation, Young also told Barrow that he intended to vote against unionization. (Tr. 1043.)

3. Manager Lee and employee Christopher Lucas

Lucas noticed that Lee was verbally disrespectful to the employees after the employees started attending meetings.[14] After the first or second meeting with ILA, Manager Anthony Lee, outside the breakroom in late morning, told Lucas that he knew the employees had a meeting with the ILA. Lee further told Lucas that he knew who attended the meeting. Lee continued, "You guys are not going to lose my job. If I lose my

[14] Lucas testified that, before the unionization efforts, Lee would slam his fist on the table, or kick the table or chair whenever he was angry. (Tr. 502.) Lee also used curse words before, but during the unionization efforts, Lee now directed the cursing at the employees. (Tr. 504.)

job, it's going to be trouble for everybody." Lucas said he did not know what Lee was talking about. No one else was around. (Tr. 495-497.) Lee also told Lucas that he knew Mike McManus started the unionization. (Tr. 500.)

Lee made similar comments multiple times to Lucas and always mentioned that he thought his job was at risk. Lee would say: "You mother fuckers think I'm going to lose my job, you guys are going to pay the consequences. I'm not going to lose my job. I have a daughter to which I got to pay for. Why the hell would you all do that?" (Tr. 503.) On one occasion, Lee called Lucas on Lucas's personal cell phone, cussing about the union: "I don't understand you guys. If I lose my job, everybody's going to pay." Lucas made no comments in return because his family was present. (Tr. 496-497.)

On another occasion, Lucas, while on the break room's porch, observed Manager Lee storm over to the shop where Mike McManus was working. Lee pointed his finger at McManus and was cursing loudly. (Tr. 498.) Lee continued his tirade for a couple of minutes and then McManus walked away from Lee. (Tr. 499.)

Lucas, while at his yard jockey truck, observed Lee with Earl Smith, who was on the step of his yard jockey truck. Lucas was about 5 to 6 feet away from the men. Lee told Smith that if he lost his job, "You guys are going to pay the consequences. I know that you're retired. So I know you're probably giving the guys some pros about it." Lee repeated the part about losing his job. While he talked, Lee kicked the truck tire. (Tr. 500-502.)

4. Manager Lee's conduct continues

Employee David Wade attended only one meeting with the ILA, which was likely the third meeting. (Tr. 830-831.) After that meeting Wade observed that Lee's demeanor towards the employees changed. (Tr. 831.)

The day after the third meeting with ILA, in the regularly scheduled morning safety meeting, the employees asked how much work was needed for that day. Manager Lee would not say how much work but instead told the employees to ask Kevin Basnight. The employees again asked for the work. Lee said, "No, you all got the Union taking over. You all go ask them. Go ask them what you got." Carlos Jones said it wasn't like that. Earl Smith asked what was wrong with someone trying to improve their household and livelihood so that they could live a little better. Lee said, "Not on my watch. Do it some other time." (Tr. 832-833.) The employees asked what was wrong with doing so, trying to better their lives. Lee told the employees that they were going to cause him to be fired and he wouldn't be able to pay for his daughter's college. (Tr. 833.) At the end Lee accused the employees of trying to take over. The employees said they were just trying to get representation. Lee then blamed McManus for unionization efforts. The employees denied that McManus was involved. (Tr. 831-833.)

Jones reported that Lee similarly vented every day and no one talked back to him. (Tr. 902-903.) However, one day Earl Smith asked Lee what was wrong with someone trying to better their livelihood and situation. Lee said nothing was wrong with it but not on his watch. (Tr. 903.)

5. Lee interrogates Earl Smith and Rayeon Jordan

Manager Lee was well aware that Smith previously worked in a facility in which ILA represented the employees. Smith previously talked freely about it before all employees and management, including Lee and Barrow. (Tr. 1111.) Before the election, Lee approached Smith in the yard while they were alone. Lee asked why Smith did not inform him that the employees were trying to unionize with the ILA. Smith told Lee that the guys were trying to do better for themselves. Lee left in his truck. (Tr. 945-946.)

Shortly thereafter, Lee again approached Smith while Smith was parking a chassis and container in the yard. As in the previous situation, Lee again asked why Smith would not tell him about "the action." Smith again said that the employees were trying to improve their situations by improving their benefit packages and trying to look towards the future. (Tr. 946-947.) Lee, displeased, stated that he would not have a job if the union came in. Smith told Lee that he probably would have a job. Lee left in his truck. (Tr. 947.)

Lee separately approached Rayeon Jordan in the parking lot. Lee asked whether Jordan or any of his coworkers attended a union meeting. Jordan told him he did not know anything about it. (Tr. 1055-1056.)

6. Lee continues his confrontations about unionization

Lee approached a number of employees in the breakroom before the election. Smith stated the other employees included Christopher Lucas, Ron Spencer, Ernest Perry, Vernon Cuffee and Mark Keating. Smith testified that Lee had a disgusted look on his face and Lee came over the table in the break room. Lee again asked why he wasn't told about the unionization and why the employees would want to bring in ILA. (Tr. 948.) Smith told him that the employees were trying to do something a little better for themselves and ILA was offering up a little more than the company was. (Tr. 949.) Lee hit the table with his fists and then walked off. (Tr. 949.)

Lee also met Vernon Cuffee outside the break room while they were alone. He told Cuffee that ITS did not want the union and the employees would lose their jobs. (Tr. 1282.)

C. Manager Lee Makes Threats on the Day of the Election

On November 1, 2018, Basnight served a copy of a petition for an election upon ITS. (GC Exh. 5.) On November 5, 2018 ILA Local 1970 filed a petition with the Board for an election. The following bargaining unit was at issue:

> All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics, EXCLUDING all office [sic, clericals], watchmen, guards, professional employees and supervisors as defined in the Act.

(GC Exh. 4.)

On November 28, 2018, in the Norfolk Yard's breakroom, a Board agent conducted an election to determine whether employees wanted to select ILA as their exclusive bargaining representative. Carlos Jones was the union observer and Marcus Hunter was the employer observer. (Tr. 41.)

Jones worked on the yard jockey until about 10:30 or 11:00 a.m., when it was time to prepare for the election in the break room. (Tr. 842-843.) He went to the break room and acted as the union observer at the election. Marcus Hunter was the company representative. (Tr. 843.) For the pre-election conference, the observers, Basnight, Wallace, Lee and the Board agent were present. Lee started shaking his head at Jones. Jones asked Lee why he was shaking his head and if Lee had something to say, he should say it. Lee said he had nothing to say. Basnight asked Jones to be quiet, which Jones did. (Tr. 906.) After the Board agent gave instructions, Basnight and Wallace left the premises and Lee left the room. (Tr. 905-906.) The election then proceeded.

During the day, Vernon Cuffee, standing on the step of the break room area, heard Manager Lee say that the employees were stupid and were not going to have any jobs. Lee looked angry. (Tr. 1231, 1286-1287.) Cuffee then went back to his hostler truck.

While the election was conducted, Ron Spencer was working in the office when Manager Lee came in. Barrow and Darryl Halsey were present. Spencer heard Manager Lee say that he saw Carlos Jones sitting in the election room and called Jones "that little MF." Lee proceeded to say if he had a gun, he would shoot Carlos Jones in his head. Lee and Barrow then walked out the door to the outside. (Tr. 42, 78.) Everyone present walked away. (Tr. 576.) Spencer reported the conversation to Jones, but Lee never repeated that statement to Jones. (Tr. 845.) Lucas, who was off for that day but came in to vote, also testified that he heard Lee make the threat.[15]

The election resulted in 14 votes cast for ILA Local 1970 and 3 votes against representation, without any challenged ballots. (GC Exh. 8.) Present for the count were the Board agent, the 2 observers, Lee and Basnight. After the results were announced, Lee shook his head. Lee told everyone in the room and the employees outside the door, including Carlos Jones, Mike McManus, and Darryl, that they had made a "huge mistake" and "it wasn't going to work out for them." Basnight noticed Lee was irate. (Tr. 1647.)

After the election was over, at about 1 p.m., Lee approached McManus after McManus returned from his lunch break. (Tr. 1132.) Lee, acting upset and aggressive, said the vote to go union went through. Then Lee told McManus to "meet outside the gate." (Tr. 44, 575, 1132-1133.) The phrase "going outside the gate" means someone wants to fight, apparently outside the work premises. McManus walked away and finished his work day. (Tr. 45, 1133.) No one reported Lee's statement to management.

After the election was over and the ballots were counted, Rayeon Jordan witnessed Lee talking to Marcus Hunter outside the mechanics' break room. Another coworker, whose name Jordan could not recall, was present. Lee, shaking his head, said that he was in discord and disbelief that the vote was majority yes. To Jordan, Lee looked upset. Lee went into his office and Marcus returned to the break room. (Tr. 1059-1060.)[16]

[15] Spencer's version of Lee's statement about shooting Jones in the head is essentially corroborated by Christopher Lucas (Tr. 505-506) and Halsey (Tr. 575). The conversation more likely occurred outside, as opposed to Spencer's version, which said the statement was made in the office.

[16] Outside the breakroom, about 5 to 10 minutes after Jordan witnessed March and Lee's discussion, Marcus told Jordan he should have voted no. Jordan started screaming and yelling at him. Jordan did not know how Marcus knew how he voted. (Tr. 1062.)

D. Lee's Conduct Continues Post-Election

Two days after the election, Vernon Cuffee reported Manager Lee approached Earl Smith in the breakroom, while Cuffee, David Wade, Spencer, Halsey and Carlos Jones were present. Lee began by talking to Smith about the ILA and that Smith was with them. Lee and Smith argued, then Lee kicked the chair, saying "We will all lose our jobs."

Lee also told them they were stupid and Basnight with the ILA was a "snake." Lee walked out and the employees went to work. (Tr. 1290-1291.)

Clarke also recalled, after the election, Lee said that the employees were trying to make them lose their jobs because the employees wanted a union. (Tr. 659.) Clarke said she wanted something better for herself and that was why she was thinking about joining the Union. (Tr. 659.) After the election, Lee also said, "You think you're going to have a job. You're not going to have a job if you voted." Clarke asked him how he knew how she voted. (Tr. 659-660.)

While she was working in her office, Clarke also heard Lee on the telephone, saying "[T]hey trying to be slick, they trying to get a union up here. She acted like she did not hear Lee say that he thought Mike McManus was responsible for bringing in ILA Local 1970.[17] (Tr. 656.) Afterward, Lee said to Clarke: "Why would you join a union. It's not good for you. And, you going to see that you're not going to have a job." Clarke could not recall whether other employees were present. (Tr. 655.) Lee also told Clarke that she would not have a job or a house. (Tr. 694.) Clarke told him that she did not think anyone would lose their employment. (Tr. 695.)

Even after the election, Lee asked McManus whether unionization was going forward and McManus said yes. (Tr. 1133-1134.) ILA Local 1970 was certified as the exclusive bargaining representative on December 10, 2018. (Tr. 1649; GC Exh. 9.)

E. ITS Notified the Employees That It Was Leaving Norfolk Yard

In October 2018, ITS gave a 90-day notice to Norfolk Southern that it was declining to continue its contract relationship ITS and ILA Local 1970 did not meet to bargain a contract. After the election, an ITS representative met with its Norfolk Yard employees and managers and told them that ITS was leaving the facility because it was not making enough money. The ITS representative met individually with employees and asked a few[18] if they wanted to relocate to other facilities, such as Georgia or Charlotte, North Carolina. Despite the ITS representative's assurances that unionization had nothing to do with leaving, Clarke testified that Manager Lee repeatedly said the employees were losing their jobs and ITS was leaving because the employees wanted a union. (Tr. 661.)

X. ENTER RESPONDENT H&M

Effective January 23, 2019, Respondent H&M became the contracted operator for the Norfolk Yard. H&M's corporate offices, including finance, billing and human resources offices, are located in Iselin, New Jersey. At the time H&M entered into Norfolk Yard's

[17] Clarke required some leading questions on direct to develop this portion of testimony. I include it only to explain the following testimony.
[18] Cuffee and Clarke were both offered positions.

scene in 2019, it employed 500 employees. It had four divisions: administrative; rail, warehousing (American terminals and distributions); and, maintenance and repair.

Charles Connors was H&M's president. He has worked for H&M for over 25 years. His ran operations and assured productivity. In January 2019, Jesse DeGroot was regional manager of intermodal operations. (Tr. 1900-1901.) In October 2019, DeGroot was promoted to vice president of intermodal operations, which included hiring development, budgeting and fiscal responsibility for the intermodal operations. (Tr. 1899-1900.)

Like the work at the Norfolk Yard, H&M's work in the rail facilities involves removing and replacing containers on and off rail cars. Each container moved on and off cars is measured in twenty-foot equivalents (TEUs). The containers are placed or removed from chassis. (Tr. 274-275.) The containers are either placed in the rail yard or removed from the rail yard by truckers who are not employees in the rail yard. The chassis moving in and out of facilities are checked by gate clerks who are employees of H&M.

Before H&M came to the Norfolk Yard, H&M and various Teamster locals had 3 rail facilities under collective-bargaining agreements. H&M had collective-bargaining agreements with Teamsters Locals 710 and 705 at its Chicago rail facilities. (Tr. 286.) Teamsters Local 560 represented the mechanics at H&M's Croxton, New Jersey rail facility. (Tr. 287.) At the time of the hearing, Connors had served on the board of trustees for Teamsters Local 560's benefit plan for 25 years. (Tr. 2024-2025.)

A. H&M Successfully Bids for Work at the Norfolk Yard

On November 27, 2018, Norfolk Southern requested H&M provide a bid by the end of the week for performing lift operations and chassis maintenance at the Norfolk Yard. (Tr. 264-264, 268; GC Exh. 99.) Given the short time period in which H&M had to bid on the work, Norfolk Southern said it was particularly interested in H&M's staffing proposal.

Eric Fonville, Norfolk Southern's group manager for purchasing, negotiated this contract with Connors. (Tr. 1206.) In addition to quotes on the services, Fonville posed, in writing, a list of 6 questions for H&M:

1. What is your plan for staffing the facility to meet Railway's service requirements during an initial transition period from the current facility operator, and how long do you plan this period to last?

2. What is your plan for staffing the facility to meet Railway's service requirements on a steady-state basis following the initial transition period?

3. How many employees in each job classification do you plan to use?

4. Do you have existing employees able to perform the work or will you need to hire new employees (and, if so, how many)?

5. If you plan to use existing employees, are those employees covered by an existing collective bargaining agreement, when does the collective

6. bargaining agreement expire, and have prior union negotiations resulted in any work stoppages, slow-downs, or sick-outs?

7. Have you entered into any labor peace or neutrality agreements that would apply to the work you would perform at this facility? If you do not have an existing collective bargaining agreement or plan to largely rely on newly hired employees, what plans, if any, do you have to

ensure that labor disruptions do not result in an interruption of service at the facility?

H&M never provided a written bid or proposal to Norfolk Southern's contracting agent. (Tr. 1202-1203, 1207.) Fonville testified that he never received any response to the six questions but asked Connors whether he would be staffing with union or non-union employees. (Tr. 1197, 1210.) Connors said he had collective bargaining agreements with the Teamsters at other facilities and the out-of-town employees were represented by the Teamsters. (Tr. 1201.) Connors did not tell Fonville how long the out-of-town employees would stay at Norfolk Yard and only stated as long as H&M could hire and train "local folks." (Tr. 1198-1999.) Connors initially testified regarding discussion of question 5 on the bid, Connors testified it was likely he told the contracting agent that H&M would use Teamsters 710, located in Chicago and see if they are interested in being the Union of record for Norfolk. (Tr. 285-286.) Connors later testified that he advised that H&M would bring out-of-town, current H&M employees to begin operations at the Norfolk Yard, then hire local people to operate that facility. Connors did not provide information about how many employees he would hire in each job classification. (Tr. 1199.) Fonville did not express any dissatisfaction with the employees who were currently staffing the facility through ITS. (Tr. 1197-1199.)

About January 4, 2019, Norfolk Southern selected H&M to perform the Norfolk Yard work. (Tr. 297.) H&M entered into an agreement for lift operations and chassis maintenance effective January 23, 2019, which was signed by Norfolk Southern's representative on January 4, 2019 and Connors on January 28, 2019. Under this Operating Agreement, H&M agreed to operate the Norfolk Yard's intermodal facility, which was the same type of services ITS previously provided. (Tr. 1188; GC Exh. 188.) That same day, Connor received the contract, which contained the specifications for performance and had an effective date of January 23, 2019. (Tr. 301; GC Exh. 100.) The contract provided that H&M would be paid per lift and for gate labor. The contract directed gate hour Monday through Friday from 4:00 a.m. through 11:00 p.m. and Saturday and Sunday from 7:00 a.m. to 5:00 p.m. The contract specified that gate labor would include 5 full-time equivalents. (R. Exh. C.)

On January 23, H&M and Norfolk Southern also entered into a chassis maintenance agreement. H&M and Norfolk Southern entered into a lift machine maintenance agreement effective June 1, 2019. (GC Exh. 188.) The lift maintenance agreement provided for the same type of services ITS previously provided for cranes. (Tr. 325, 1185; GC Exh. 97-98.)

B. H&M Agrees Teamsters Local 822 Can Organize Norfolk Yard

H&M and Teamsters Local 710 in Chicago maintained a collective-bargaining agreement for the work at one facility where H&M contracted, which was known as Global

I, located at 1425 S. Western Avenue, Chicago, Illinois. (GC Exh. 182 at 977-978.) Connors interpreted Article 2, Section 5(a) of that agreement to require H&M to conduct a card check at any new facility. (Tr. 295; GC Exh. 182.) In previous years, H&M relied upon this language to notify Teamsters Local 710 and 705 when it acquired new facilities within those locals' jurisdiction, in Chicago. (Tr. 2058-2059.) Section 5 of that Agreement states:

> (a) An Employer and all other business entities owned and/or controlled by the signatory Employer or its parent, having Employees performing work within the classifications defined in this Agreement, shall accept a card check as proof that such Employees have designated the Union as their bargaining agent. Upon a valid card check, Employees at the operation in question shall be covered by this Agreement, or covered by a new Agreement specifically negotiated on behalf of the said unit.
> (b) If an Employer refuses to recognize the Union as set forth above and the matter is submitted to the National Labor Relations Board or any mutually agreed upon process for determination, and such determination results in certification or recognition of the Union, all benefits of this Agreement shall be retroactive to the date of demand for recognition.

(e.g., GC Exh. 182 at 980.)

Regarding Norfolk Yard, Connors could not recall whether he talked with Teamsters 710 before or after H&M secured the contract to perform work at the Norfolk Yard, but believed it was early January 2019. (Tr. 288, 2026.) Connors did not know how the card check process would work. (Tr. 298.) Connors knew that Teamsters 710 did not have any jurisdiction in Virginia. (Tr. 289.) However, Connors thought that Teamsters 710 told him that it would contact the International Brotherhood of Teamsters to assist with the process. (Tr. 2047-2048.) At this time H&M had no collective-bargaining agreement or card check agreement with the Teamsters Local 822 in Norfolk. (Tr. 309, 364.)[19]

Teamsters Local 822 President James Wright contacted Connors by telephone. In that conversation, Wright told Connors that Teamsters Local 822 wanted to represent H&M employees at the Norfolk Yard. They discussed the "proper channels" for recognition, including neutrality and obtaining membership cards from employees. (Tr. 2048.)

On January 10 and 11, 2019, Connors traveled to Norfolk. (Tr. 302-303; R. Exh. O.) While in Norfolk, Connor met with the president of Teamsters Local 822 James Wright during a lunch. (Tr. 304; R. Exh. H.)[20] They discussed Teamsters Local 822 representing the employees at the Norfolk Yard. Connors told Wright he was familiar with the ILA. Although Connors could not recall whether they discussed card check, Connors told Wright that if Teamsters 822 obtained enough signatures, he would have to recognize Teamsters Local 822. (Tr. 308-309, 2049-2050.) Wright provided his business card by

[19] Connors, who attended the hearing as the company representative, later testified that he met not only with Wright but also an unknown union representative. (Tr. 2027.)

[20] Wright testified that the International Brotherhood of Teamsters contacted him about organizing H&M. He initially did not recall meeting with Connors face to face in early January 2019 and had no independent recollection of the meeting. (Tr. 424-425, 433-434.)

email and Connors expected to have future contacts with Wright. (Tr. 306; R. Exh. H.) No written card check agreement existed between H&M and Teamsters Local 822.[21]

On Monday, January 21, Connors flew back to Norfolk and returned home on January 23. (Tr. 311-312; R Exh. P.) At no time did H&M communicate with ITS about ILA Local 1970 or have further communications with other Teamsters locals or the International Brotherhood of Teamsters. (Jt. Exh. 1 ¶2.)

V. H&M SENDS RAIL YARD EMPLOYEES FROM CHICAGO AND NEW JERSEY TO THE NORFOLK YARD

In preparation for taking over the Norfolk Yard, DeGroot wanted "trusted employees" to assist in opening operations and training employees at the Norfolk Yard. Although unaware of the condition of the yard, DeGroot required hostler trucks, pickup trucks, safety equipment and office equipment for the facility. (Tr. 1924-1925.) DeGroot initially sent 4 hostler trucks from H&M's Chicago facilities to Norfolk Yard. (Tr. 1928.)

H&M offered travel opportunities to a number of its employees in its Chicago, Illinois and New Jersey facilities. None of the traveling H&M employees received any written communication about their upcoming duties. (Jt. Exh. 1 ¶4.) The type of work to be performed for Norfolk Yard was expected to be the same as the work performed in their home yards. (Tr. 1930.)[22] DeGroot made flight, hotel and car rental arrangements for employees from Chicago and its Croxton, New Jersey facility for their time in Norfolk. (Tr. 132, 313-314, 1966-1967.) Each employee received a $40 per day per diem. (Tr. 1967.) Except for Connors, all traveling H&M employees and DeGroot stayed at the same extended stay hotel. With the exception of one H&M employee from New Jersey, none returned after their brief stints at Norfolk Yard. In addition to the employees discussed below, 4 additional H&M traveling employees, none of whom were called to testify, assisted at Norfolk Yard.

A. The Chicago Group

The selected traveling H&M employees worked at various H&M yards in Chicagoland area. All of the Chicago contingent of traveling employees were dues-paying members of Teamsters Local 710; none of them rescinded their memberships in Teamsters Local 710 while working at the Norfolk Yard. None of them made any application for their Norfolk Yard positions.

On January 21, 2019, 5 Chicago H&M travelers flew to Norfolk: Peter Distel; Steven Frayne; Roman Senteno; Desmond Mitchell; and Steven J. Coffey. (Tr. 97, 134,

[21] In its June 8, 2020 position statement during the investigation, Teamsters 822, by Business Agent Wright, stated that another Teamsters local contacted it about organizing H&M. He characterized recognition as first obtaining the cards and then some "back and forth" with H&M until H&M recognized it on a card check. (GC Exh. 183 at 1047.) The "back and forth" is not detailed and I therefore cannot give it much, if any, credit.

[22] I discredit DeGroot's testimony that the ability to transfer to new locations was "a common industry practice" and that some of the traveling employees expressed interest in doing so. (Tr. 2012-2013.) None of the credited testimony of the Norfolk Yard traveling employees corroborates these claims.

171-172; GC Exh. 31.) They did not go to the Norfolk Yard until two days later. (Tr. 134-135, 172). One Chicago employee, Page, drove to Norfolk with DeGroot in DeGroot's personal truck and hauled office supplies to the Norfolk Yard.

Peter Distel was a "spotter operator," who loaded and unloaded the trains, which was the same work as a groundsman. DeGroot asked him to go on assignment to the Norfolk Yard. He told DeGroot he could only stay at Norfolk Yard for 2 weeks. (Tr. 95.)

Steven Frayne was a hostler driver and crane operator. DeGroot also told Frayne about the opportunity to help start up H&M's operations at Norfolk Yard and stay for 2 weeks. (Tr. 128-129.) DeGroot did not offer Frayne any opportunity to permanently transfer to Norfolk Yard. Frayne, by his own decision, stayed at Norfolk Yard only 2 weeks. (Tr. 144.)

Roman Angel Senteno was another "spotter operator," who moved freight cargo with a side loader crane. Other employees told Senteno about the operations at Norfolk Yard, so he asked DeGroot to go. (Tr. 166-168.) Senteno reported that he initially reported to DeGroot at Norfolk Yard for a couple days, then reported to Terminal Manager Lee. (Tr. 182.) Senteno was not asked to transfer permanently to Norfolk Yard and did not ask to stay either. (Tr. 168-169, 194.)

John Page was the only Chicago employee who did not fly to Norfolk; he drove there with DeGroot. Page and DeGroot arrived about January 21, 2019 and operations were scheduled to start Wednesday January 23. Page was qualified to perform crane work, driving hostler truck and groundsman duties. Page testified, somewhat tentatively, that either DeGroot or his terminal manager told him that the ITS employees were trying to bring the ILA.

Page, due to his training duties, expected to stay at Norfolk Yard only 2 to 4 weeks. Page was paid overtime and a per diem while there. (Tr. 1428.) While working at the Norfolk Yard, he continued to pay dues to Teamsters Local 710. (Tr. 1431.) At the conclusion of his time at Norfolk Yard, Page flew back to Chicago. Page never went back to the Norfolk Yard. (Tr. 1426.)

B. New Jersey Employees

Scott Darvalics works for H&M as the working foreman in the chassis and trailer shop at a yard in Jersey City, New Jersey. (Tr. 201.) He joined Teamsters Local 560 within a few months after he began employment with H&M. (Tr. 204, GC Exh. 28.) He has not revoked his membership and pays dues through dues checkoff. (Tr. 205.) In 2019, his duties include perform repairs, coordinating, ordering parts, organizing the work for the day and training employees. (Tr. 205.)

In January 2019, Darvalics went to work in the Norfolk Yard after his New Jersey supervisor Ryan Burke asked if he could help start up a yard. (Tr. 206.) He drove a rental van from New Jersey to the Norfolk Yard and used that throughout his stay in Norfolk. He stayed at an extended stay hotel. (Tr. 207; GC Exh. 26.) He arrived on January 21 and departed February 1, 2019. (Tr. 208; GC Exh. 26.) Darvalics reported that, during his second week at the Norfolk Yard, another New Jersey mechanic, Aleber Guman, came to work in the Norfolk Yard.

Darvalics testified that he returned for another week, date unknown, but did not have to sign another Teamsters Local 822 card. (Tr. 219-220.) Darvalics did not intend to stay at the Norfolk Yard. (Tr. 215.)

VI. On January 23, 2019, The First Day of H&M Operations At Norfolk Yard, H&M Recognizes Teamsters Local 822

Before the traveling H&M employees went to work at the Norfolk Yard, Teamsters Local 822 agents obtained cards from those employees. Within a few hours, Teamsters Local 822 demanded recognition for the employees at Norfolk Yard. In less than an hour after the demand, H&M recognized Teamsters Local 822 as the exclusive bargaining representative of the employees at Norfolk Yard.

A. On January 23, 2019, Teamsters Local 822 Officials Obtain Authorization and Membership Cards from the Chicago and New Jersey H&M employees

The evening before the traveling employees were to begin work at the Norfolk Yard, DeGroot told the traveling employees that the "Union" (Teamsters 822) was coming in the following morning and instructed them to complete union paperwork, which included union cards. (Tr. 136-Frayne; Tr. 100-Distel.)[23]

Before the H&M employees went into the yard, the traveling H&M employees ate breakfast in the breakfast area of the hotel where they were lodged. Teamsters Local 822 representatives found them and obtained signed cards.

Teamsters 822 President Wright assigned Business Agent Steve Jacobs[24] to complete organizing the H&M employees. (Tr. 445-446.) President Wright sent union officials Jacobs and Johnny Sawyer[25] to the hotel to meet with the traveling H&M employees. (Tr. 358-359, 425.) Sawyer knew he was meeting the out-of-town employees scheduled to perform the set-up work at H&M.

Wright testified the International told him where the employees were housed but had no information as to how the International gained that information. (Tr. 448.) Wright apparently did not share how he knew what time and date he was to send his business agents to the hotel where the traveling H&M employees were housed. Jacobs and Sawyer did not know how Wright was apprised of what hotel to send them to or why that time. (Tr. 357.)

As promised, the next morning in the hotel's breakfast area, Teamsters Local 822 representatives met the traveling H&M crew and gave them cards to sign. (Tr. 100; GC

[23] Connors admitted that after the first day of hearing, he asked DeGroot whether he helped anyone complete "forms." Connors reported that DeGroot said he could not recall. (Tr. 241-242.) Connors admitted he violated the sequestration order. On voir dire, DeGroot could not recall the specifics of the conversation with Connors. (Tr. 1951-1952.)

[24] Jacobs was a business agent and recording secretary for Teamsters Local 822 before he retired on November 1, 2019. (Tr. 1481-1482.) Jacobs testified to the normal procedures for organizing a unit when employees contact Teamsters Local 822.

[25] Sawyer became secretary/treasurer of Local 822 in August 2019. While he was a business agent, he was primarily responsible for UPS and UPS Freight contracts.

Exh. 25.)[26] Teamsters Local 822 President James Wright directed the representatives to go to the hotel; Sawyer testified that he did not pass out or receive cards or talk to the H&M employees. (Tr. 360.) In contrast, Jacobs testified that he and Sawyer gave short speeches about the benefits of unionization; however, Jacobs also testified that he knew these employees were already represented by other locals. Jacobs recalled taking authorization cards but no other materials. (Tr. 1503.) Sawyer estimated that he and Jacobs spent about 30 to 40 minutes at the hotel with the H&M traveling employees. (Tr. 376.)

Some of the traveling H&M employees testified that, at first, they met with Jesse DeGroot in the breakfast area at the hotel. (Tr. 135-Frayne)[27] Distel reported that DeGroot told him to sign the card and go to work. (Tr. 100-101, 115-116.) Frayne testified that DeGroot asked the travelers to sign union cards. (Tr. 136.) DeGroot also provided Norfolk Yard's address. (Tr. 145.) Distel, Frayne, Senteno did not ask why the Chicago H&M crew had to sign union cards but did so. Darvalics did not know anyone else there but was handed a card by a Local 822 union representative and told to sign the card. (Tr. 210.)[28]

Page "may" have met the union guys at the hotel once. He "maybe" met them at the continental breakfast area. (Tr. 1406.) Then he says there were two union guys, pretty sure they were Teamsters. His card was also dated Jan. 17, 2019 but he did not fill out the dues checkoff section. (Tr. 1408-1409; GC Exh. 25 at 150.) He thinks he was told to sign the union card about a week into his stay. Chuck Connors was present when that happened but did not say anything; DeGroot was not present. He was called to the break room and told this is the union rep. Union rep brought a booklet with his papers and said everyone had to fill it out, including the employees in training. Everyone had to fill it out. (Tr. 1402-1404.) May have met the union guys at the hotel once. "Maybe" met them at the continental breakfast area. (Tr. 1406.) Then he says there were two union guys, pretty sure they were Teamsters. He denied talking to the other employees about representation by Teamsters. (Tr. 1428.)

Senteno testified he was late getting to breakfast. (Tr. 193.) Senteno testified that when he received the union card, he saw DeGroot and Connors in the hotel lobby. He could not recall talking with DeGroot about signing the card. (Tr. 175-177.) He signed a card that he received from the Teamsters Local 822 guys. (Tr. 175.)

In all, Teamsters Local 822 obtained 5 cards from the traveling employees. (GC Exh. 25.) The union cards were dated differently that the date employees signed the cards. All traveling H&M employees testified that they signed the cards once they were in Norfolk, which could not have been before January 21. However, the cards are dated January 17 with employment dates also written in as January 17. Nothing in the record explains why the dates are incorrect. For Frayne, the date on the card was January 17,

[26] Frayne testified that it was the day before the travelers went to Norfolk Yard.

[27] DeGroot testified that, about 2 or 3 a.m. that morning, he went to Norfolk Yard where Juan Santoy, H&M's manager of maintenance operations and equipment, was already working. Santoy was no longer working for H&M at the time of the hearing. DeGroot did not testify that he stayed at Norfolk Yard that morning.

[28] Darvalics recalled the area the hotel lobby but the other H&M employees were present. He also said DeGroot was present that day but did not recall Connors being present. He did not recall DeGroot saying anything to him that morning. (Tr. 211.)

but he was clear that he signed the card after he flew to Norfolk. (Tr. 138-139, 177-178; GC Exh. 25.) Frayne also noted the Norfolk Yard address on the card after he asked DeGroot what the address was. (Tr. 145.)

The cards also lacked identification of what local the traveling employees agreed to have represent them. Each card, at top, was labeled "APPLICATION AND NOTICE For Membership in Local Union No. _____." All of the cards signed by the traveling H&M employees left the local union number blank. (GC Exh. 25.) Jacobs identified that failure as a deficiency in the cards. Jacobs testified that he usually did not request traveling status employees to sign cards and had never done so before. (Tr. 1499-1500.) Jacobs testified that he did not recall asking any of the H&M traveling employees to sign authorization cards because he knew the employees were only there to help with set-up and belonged to other locals. He learned this information from Sawyer and two additional individuals, whose names he could not recall. (Tr. 1499.) Nonetheless, Jacobs admitted that he took the cards. (Tr. 1508.)

After signing the cards, the H&M traveling employees did not have any further contacts with Teamsters Local 822. (Tr. 145-146, 189.) They did not pay dues to Teamsters Local 822. Both Distel and Frayne testified that they worked other H&M set up projects but never had to sign union cards before working at Norfolk Yard.

B. H&M Recognizes Teamsters Local 822 as the Exclusive Bargaining Representative of the Norfolk Yard Unit Within Hours of H&M Traveling Employees Signing Union Cards

As of January 23, 2019, H&M and Teamsters Local 822 still had no written card check agreement. (Jt. Exh. 1 ¶5.) At 11:34 a.m. January 23, Teamsters Local 822 Business Agent Sawyer emailed Connors that a majority of employees at the Norfolk Yard signed cards requesting representation by Teamsters Local 822, which was pursuant to "their" card check agreement. (Tr. 316; GC Exh. 48.) Sawyer testified that he understood Wright and Connors reached a card check agreement before the cards were signed. (Tr. 363-364.)

Connors did not see the cards to verify whether a majority was reached, nor was a third party used to verify the card check. (Tr. 296, 320-321.)[29] He also did not know whether the employees who signed the cards were permanent employees of the Norfolk Yard. (Tr. 2052.) Connors had a vague recollection of discussing the matter with DeGroot, who allegedly said Teamsters Local 822 had enough cards. (Tr. 319.)

Thirty-three minutes after receiving Sawyer's email, at 12:07 p.m., Connors sent Sawyer an email stating that he understood and agreed "to recognize Teamsters Local 822 as the bargaining representative of our employees located the NS Terminal located at 1710 Atlantic Ave Chesapeake Va." (Tr. 318-319; R. Exh. I.) At hearing, Connors admitted that, assuming that he knew that the Norfolk Yard ITS employees were

[29] Connors later testified that he could not say for sure that he did not see the cards but had a vague recollection of seeing the cards. He then said, "So I'm not too sure. I can't say for sure." (Tr. 2050-2051.) I discredit this wishy-washy testimony and find that Connors' earlier testimony, admitting he did not see the cards, was accurate.

represented by ILA Local 1970, he would have withdrawn recognition from ILA and recognized Teamsters Local 710.[30]

C. Traveling H&M Employees Perform Work for a Limited Time and Generally Did Not Return After Their Short Stints

H&M traveling employees performed work similar to what they performed in their home locations. Frayne used a truck marked H&M. However, the rail cars moved in the Norfolk Yard were no different than what he moved in Chicago. (Tr. 141.)

After he signed the card, Distel went to work at the Norfolk Yard, loading and unloading trains with hostler truck, forklifts and side loaders. He received no training to work at that yard. His pay rate did not change while working there. (Tr. 104.) Distel worked at Norfolk Yard for 2 weeks.

Senteno also testified that, after that breakfast when he signed the card, he went to Norfolk Yard. (Tr. 193-194.) While working there, Distel reported to Jesse DeGroot, but could not recall any local management. (Tr. 105.) Senteno trained two people who were present from ITS on the side loader and hostler truck. One already knew how to drive a hostler. (Tr. 180.)

Darvalics performed the same type of work in the Norfolk Yard as he performed in New Jersey. (Tr. 213.) He worked on the chassis and all intermodal equipment and Jermaine Collins repaired cranes and yard trucks. (Tr. 213-214.) Intermodal equipment, such as chassis, were not changed from ITS. (Tr. 214.) He trained Collins on how parts were ordered and more efficient ways of working. (Tr. 215.) Darvalics found Collins did not require much supervision in his mechanic work. (Tr. 216.)[31]

Distel and Steven Frayne flew back to Chicago on February 2, 2019. (Tr. 106-107; GC Exh. 32.) Frayne did not train anyone but found that the predecessor's managers and employees helpful. (Tr. 154-155.) Senteno and Morgan had reservations to fly back to Chicago on Feb 13, 2019. (Tr. 185-186; GC Exh. 38.) However, Senteno's hotel bill reflects that he was not present after February 4, 2019. (GC Exh. 39 at 318.) They never returned to the Norfolk Yard.

Operations Manager Barrow testified that the traveling employees stayed approximately 2 weeks. (Tr. 1776-1777.) DeGroot testified that he had no expectation that any of the traveling team would stay at the Norfolk Yard and none of the traveling team made any "formal" request to do so. (Tr. 2018.) DeGroot stayed at the Norfolk Yard for 2 weeks. (Tr. 1968.)

While the traveling H&M employees were stationed at Norfolk Yard, they continued to be paid through their home department instead of the Norfolk Yard. Juanita Williams prepared time cards for the traveling H&M workers. (Tr. 1612-1613.) She then submitted the traveling employees' time records to their respective home administrative office for further processing. (Tr. 1613) The payroll records reflect, for example, that Darvalics was

[30] Due to his conflicting testimony, I find that Connors knew that ILA Local 1970 represented the ITS employees. This matter is discussed in detail in the Credibility section.

[31] Darvalics testified that he also worked with Marcus, last name unknown, who was a lift or crane mechanic. (Tr. 217.)

paid for the same home department and worked in the same department, and he was working in New Jersey. (Tr. 27.) Distel's payroll records similarly reflect that he was working in his home department in Illinois, even when working at the Norfolk Yard. (GC Exh. 29.) The traveling employees paid state income taxes to their respective home states while working in Virginia. (See, e.g., GC Exh. 29, 35, 40) Senteno paid his usual local union dues (not Teamsters Local 822) for the pay period ending February 1, 2019. (GC Exh. 40 at 330.)

D. H&M and Teamsters Local 822 Negotiate and Sign a Collective-Bargaining Agreement Covering the Norfolk Yard Employees

On January 28, 2019, 5 days after H&M recognized Teamsters Local 822, Connors signed H&M's first collective-bargaining agreement with Teamsters Local 822. Local 822 President Wright signed on February 7. (Tr. 322-327; R. Exhs. J, K.) Connors and Wright telephonically negotiated the agreement. (Tr. 321-322, 340.)[32] The parties negotiated based upon H&M's collective bargaining agreement with Teamsters Local 560, relying upon the stated boilerplate. (Tr. 2031 et seq.) H&M offered a "standard rail agreement" and negotiated salary and benefits. (Tr. 341.) The grievance portion changed to the Piedmont panel. The collective-bargaining agreement's effective dates are January 23, 2019 through January 22, 2023. The new agreement was never put to a ratification vote.

The collective-bargaining agreement describes the bargaining unit as: "All full and part time switcher drivers, crane operators, lift drivers and clerks." (R. Exh. J at 205.) The agreement contains a provision for dues checkoff. Although H&M and Teamsters Local 822 did not include mechanics in the bargaining unit, the agreement included pay scales for mechanics lead, mechanics and mechanics helper.

In February, H&M and Norfolk Southern entered into an agreement in which H&M provided chassis maintenance, retroactive to January 23, 2019. (R. Exh. E.) On June 1, 2019, they entered into a lift machine maintenance agreement. (GC Exh. 97.)

V11. IN THE MEANTIME, H&M HIRES ITS'S MANAGEMENT TEAM AND OBTAINS APPLICATIONS FROM ITS EMPLOYEES

H&M immediately hired a few of the ITS personnel and the remainder completed applications for employment. Eleven ITS employees who applied for positions with H&M were not hired when H&M took over operations at the Norfolk Yard.

A. H&M Immediately Hires the ITS Management Team and a Few ITS Employees

Already at work on January 23, 2019 were the previous ITS managers whom H&M hired to work in their same positions: Tony Lee was terminal manager and Leander Barrow was operations manager. H&M also retained Juanita Williams, the ITS administrative assistant. A few weeks before the changeover in contractor, Lee told Williams that she would be retained. (Tr. 1562.)

[32]Connors testified he and DeGroot telephonically negotiated the CBA. In contradiction of Connors, DeGroot testified that his role in contract negotiations was indirect, making suggestions about pay and perhaps 1 or 2 additional areas. (Tr. 1954.)

Barrow testified that, in late December 2018, Lee advised that H&M was the new contractor and they were retained in management. (Tr. 1788-1789.) Although H&M hired and set his pay rate on January 23, Manager Lee completed his employment application on January 27. (GC Exh. 59, p. 512; GC Exh. 63, p. 518.) Operations Manager Barrow completed his application for H&M employment on January 23. (GC Exh. 64.)[33] Lee and DeGroot approved Barrow's hire on January 23 and set Barrow's rate of pay. (GC Exh. 68, p. 530.)[34]

Williams began work on January 23, 2019 after finishing work with ITS on January 22, 2019. (Tr. 330-332, 1559-1561.) She completed her H&M application on January 23. (Tr. 1581; GC Exh. 89.) Williams received no documents describing her duties or any training. (Tr. 1564.) Her H&M duties were unchanged from what she accomplished at ITS: ordering office supplies and safety supplies; invoicing; billing; processing paperwork for new hires; tracking employees' paid time off; benefit changes; and entering payroll data each day. Williams reported to Lee, the same terminal manager she reported to at H&M. (Tr. 1559-1460.)

In addition to Lee, Barrow and Williams, H&M immediately hired Alan Young as the "lead gate clerk." (R. Exh. Y32 at 1324.) On January 22, their last day with ITS, Lee told load planner/gate clerk Young[35] that he would start working for H&M the next day. Lee told Young that H&M considered him an asset and wanted to hire him. (Tr. 1014.) Lee told Young that he would perform the same duties as at ITS but his position would be called "head gate clerk." (Tr. 1024.) Young never had to remove any personal belongings from the premises and was never told to clean out his locker. (Tr. 1015-1016.)

On January 23, Alan Young was already working as a lead gate clerk for H&M. His payroll status reflects a starting date of January 23 with approval from Manager Lee and Connors. (Tr. 511; GC Exh. 73 at 542.) Young testified he had no application with H&M at the time he started working and did not complete his application until January 25, two days after he began working. (GC Exh. 69.) Young's rate of pay was $16.75 per hour. His pay at ITS was $13.50 per hour. Although DeGroot claims he interviewed Young and was the decision-maker on Young's hire, Young's testimony undermines that claim. (Tr. 1945-1946.) In addition, the payroll/status form was signed by Lee on January 23, 2019, with a notation at the bottom "OK – Chuck Connors." (R. Exh. Y-32 at 1308.) I therefore credit Young's testimony that, the day before H&M began operations, Lee already determined Young would be hired. DeGroot admitted, however, that he relied upon Lee's recommendation. (Tr. 1946.)

Also on January 23, H&M hired Jermaine Collins, who had worked for ITS as a trailer mechanic. (GC Exh. 74.) While working on her application, Clarke overheard

[33] Barrow's training consisted of computer work. (Tr. 1778.)

[34] Barrow testified that he was hired 2 days after the transition to H&M. I discredit that testimony as Lee, Williams and Young were immediately retained. On January 23, 2019, Barrow had a conversation with DeGroot, in which DeGroot told him the expectations of the job and salary. Based upon this testimony, DeGroot had already decided to retain Barrow. (Tr. 1793-1794.) In addition, DeGroot testified that he spoke with Lee before the transition; in the that conversation, DeGroot told Lee to keep the predecessor's key employees, such as lead-type personnel, an administrator, "possibly an operations manager and clerical gate staff." (Tr. 1934.)

[35] Williams testified she always called this position a "load planner." Young was eventually replaced by Rosalend Boone. (Tr. 1587.)

Terminal Manager Lee tell Collins, when he came in, he did not have to fill out an application but come to work the next day. (Tr. 709.) Collins apparently did not complete the application process until January 27. Manager Lee approved officially Collins' application on January 27 with DeGroot's approval. (GC Exhs. 76-78.) At the time of the hearing Collins was the only trailer/chassis mechanic at H&M. (Tr. 625.)[36]

H&M also hired David Wade as a yard jockey/hostler driver, which was the same position he worked as an ITS employee. (Tr. 1849.) Operations Manager Barrow had no input in the hiring process. (Tr. 1750.) Wade completed his application on January 23. (GC Exh. 79.) Wade's H&M paperwork reflects he was hired as a lead switcher as of January 28. (GC Exh. 80, 81, 83.) Manager Lee approved Wade's hire. (GC Exh. 83, p. 563.) On March 7, 2017, Wade incurred a written warning and a 1-day suspension issued by Barrow; Wade made contact with a crane, resulting in cutting into one of the crane's tires. (Tr. 1829-1831; GC Exh. 190.)[37]

Marcus Hunter, the crane mechanic for ITS, was hired on February 5, 2019. However, at that point Norfolk Southern had not awarded the crane work to H&M, so Hunter worked on the hustler trucks, lift baskets, and the forklift, which were duties he performed at ITS. (Tr. 2076-2077.) Although Hunter did not perform chassis work upon hire, H&M gave Hunter a job description for Chassis/Container Mechanic. (GC Exh. 102.)[38]

B. On January 23, 2019, H&M's First Day of Operations at Norfolk Yard, ITS Employees Complete Applications to Work for H&M

On January 22, 2019, Ron Spencer was working in the office. Between 6:30 and 7:00 p.m., he noticed new hostler trucks marked H&M on the doors sitting in the yard. (Tr. 46-47.) Manager Lee entered the office and told Spencer to come in the following morning at 9:00 a.m. to complete an application for H&M. Lee told Spencer he could clock out early. Lee also asked why Spencer had not told him about the ILA and let him know what was going on, they were supposed to be like family. Spencer never provided a reason and clocked out. (Tr. 45.)

Also on January 22, Lucas worked a regular day with the usual ITS crew members and left about 3:00 p.m. (Tr. 508-509.) Neither Lee nor Barrow spoke to him at the end of the day. Later that day, Spencer told Lucas that some new equipment arrived. McManus did not know that January 22 would be his last day at the Norfolk Yard, but received a text from Manager Lee to come in at 7 or 7:30 a.m. (Tr. 1136.)

On her last day of work for ITS, in the office, Lee told Clarke, "You all think you got the last laugh and all of that stuff." Lee texted Michelle Clarke to come in and complete an application for H&M. (Tr. 663.)

[36] DeGroot stated Juan Santoy would have been responsible for hiring mechanics. (Tr. 1961.) However, no record evidence supports that Santoy alone hired Collins.

[37] Barrow testified that he would have provided Lee with an opportunity to see the disciplinary action before Lee would file the document. (Tr. 1831.) Barrow testified that the matter was a safety incident in addition to equipment damage. (Tr. 1832.)

[38] When H&M received the contract for maintenance and repair of the crane, a forklift was added to the maintenance shop. (Tr. 2085-2086.)

On January 22, Lee told Ernest Perry to come in the next morning at 8:00 a.m. (Tr. 1351.) Perry received an application from Lee and then went to the break room to complete his application with the other ITS employees present. (Tr. 1352-1353.) He was with Chris, Ron, Carlos and Earl. (Tr. 1353.) When he completed his application, he gave it to Lee. He saw Lee hand it to a white guy, presumably a supervisor, who told Perry that he would contact him. (Tr. 1354-1356; GC Exh. 19 at 121 et seq.)

On January 23, the other ITS employees completed their applications to H&M. Smith and Jones arrived at 4:00 a.m., their normal start times. Lee directed them to return at 8:00 a.m. Smith testified to 9:00 a.m., but Lee told him he no longer had a job there and to come back and complete an application. (Tr. 953.) They did as they were told and when then arrived around 8:00 a.m., Jones went to the main office. He noticed that Barrow and Young were outside. Barrow had just arrived. Young was loading up a work truck. Lee, with another man present, directed Jones to complete an application. (Tr. 849-851.) Lucas arrived at 4:30 a.m., as usual, but Lee met him and told him to return at 9:00 a.m. Spencer and Lucas came back at 9:00 a.m. as Lee directed. (Tr. 510.)

Jones and Smith were working on their applications when others began to arrive. Lee directed Spencer to the break room and Lee brought in applications. When he arrived, Lee directed Halsey to the break room also. Others in the break room were Mike McManus, Carlos, Jones, Christopher, Lucas, Darryl Halsey,[39] Vernon Cuffee, Raeyon Jordan, Michelle Clarke, Jermaine Collins, Mark Keating, David Wade and Ernest Perry. (Tr. 510.) Halsey completed his application and left. (Tr. 584; GC Exh. 15.) Rayeon Jordan completed and application as well while Darryl Halsey and Carlos Jones were completing their applications in the breakroom, so Jordan knew no ITS personnel were working the cranes. (Tr. 1067-1068.) Jordan obtained his application from Manager Lee and took 15 to 20 minutes to complete the form, then handed it to Lee in the front office. Jordan observed that Juanita Williams and another person were in the office; Williams was working at her computer. (Tr. 1068-1069, 1071; GC Exh. 17.)

When Jones completed his application, he placed it on Lee's desk. Lee told him that he would let him know when he heard something, when to come back or if he might be hired. Jones was not interviewed and no one asked him any questions about his application. (Tr. 854-855.)

When Smith came back, Juanita Williams gave him an application. When he completed it, Smith dropped it off with Williams, who said nothing. (Tr. 955.) He did not recall seeing Lee.

Spencer completed his application and gave it to Lee in the office. (Tr. 48; GC Exh. 21.) He noticed that Lee pulled Jermaine Collins outside the break room and overheard Lee telling Collins to come in the next day. (Tr. 80.)

McManus arrived as directed. Manager Lee and Barrow were present, as was Juanita Williams. Barrow and Williams were sitting in the same spots and using the same equipment as when they worked for ITS. (Tr. 1137-1138.) Lee instructed McManus to return at 11 a.m. (Tr. 1138.) When he returned, McManus saw Marcus Hunter and Jermaine Collins. Collins was putting tools back into the shop where he normally kept them. (Tr. 1138.) Collins listed his hire date as January 23, 2019. (GC Exh. 183.)

[39] Halsey missed date and time. (Tr. 582.)

McManus noticed other persons he had not seen before driving yard jockeys, operating cranes, and performing gate inspections. McManus, after obtaining an application from Lee, completed an application in the break room. No one else was present. When done, he put the application on Lee's desk. (Tr. 1139.)

Lucas took his application into the office and attempted to hand his application to someone Lucas identified as Lee's boss from H&M. That person told Lucas to hand his application to Lee. (Tr. 511-512.) Lucas observed Lee placing his application with other applications. Lucas asked Lee when he would hear from H&M about his application. Lee said Lucas would hear within a couple of days by telephone. (Tr. 516-517.)

When she arrived on January 23, Clarke went to the office. Lee gave her an application and she completed it in the break room. (Tr. 664-665; GC Exh. 13.) After she completed her application, she gave it to Lee, who told her to remove her things. (Tr. 665.) She was never given an interview with H&M.[40]

Vernon Cuffee obtained his application from Lee inside the breakroom. Lee stood in the room while he finished. Cuffee handed his application to Lee as he walked out and asked Lee how long it would take to get called. Lee told him he did not know and would have to see if "they" were going to hire any of the ITS employees. (Tr. 1295-1296.) He overheard Lee tell David Wade to come back. (Tr. 1299.)

Lee also instructed everyone who had a locker in the breakroom to clean them out. (Tr. 517.) Lucas said that he never had to clean out his locker before this transition. (Tr. 518.)

Except for those hired by H&M around January 23, Williams testified that the unhired ITS workforce applications were stacked on her desk, which she put in a folder. (Tr. 1604, 1610.) She then could not recall whether Jermaine Collins, who was hired, was in that stack. She recalled processing new hire paperwork for David Wade, but said Wade's application was "probably" in the stack. (Tr. 1606-1607.) Other applications came in that day, which Williams added to the stack. Williams testified that she would compile the applications until Lee told her who he was hiring. (Tr. 1611.) H&M hired Marcus Hunter, effective February 5, 2019, who currently is the lead power mechanic. (Tr. 1988.)

C. H&M's Hiring Process

Williams testified that she collected the applications from other people who applied, usually on her desk, and then gave them to Terminal Manager Lee for review. (Tr. 1572.) Lee would mention that he found an individual for a particular job, but he set up the interviews. (Tr. 1573-1574.) Williams had new hire documents available for Lee to distribute. (Tr. 1574.) Before anyone can be hired, the terminal manager was required to

[40] Clarke's affidavit said Lee loudly said, "You screwed me over, I'm going to screw you over." Clarke testified he was so loud that other employees should be able to hear him but not directly at one person. She heard him make these statements about the employees screwing him over several times. (Tr. 701.) She did not recall who else among the employees was present. (Tr. 702-703.) He was giggling and laughing, and dancing in the hallway, according to Clarke. (Tr. 704, 714-715.) Cuffee testified that Lee performed a little shimmy.

approve the hire. Then the general manager approves the hire, subsequently sending the necessary paperwork to human resources. (Tr. 1576.)

DeGroot testified that he was involved in the first few weeks of hiring but Terminal Manager Lee also was involved in every step of hiring. (Tr. 1981.) DeGroot testified that he instructs his terminal managers about his "best practices" for hiring. DeGroot's preferences for hiring with a new operation or "correcting an existing operation" would be to hire those without experience in the rail terminal industry and train from scratch to ensure employees operate as H&M prefers, such as safety protocols.[41] (Tr. 1907-1909, 2016.) Traits that DeGroot considers are: good attitude; good attendance record; and a willingness to learn. DeGroot believed that poor attitude translates to a high accident rate and lower productivity, plus an overall "toxic environment." (Tr. 1909.) DeGroot maintained that, in his experience, he had more problems with employees who worked for competitors, such as ITS. (Tr. 2016.) He also testified that some situations required keep a small number of experienced employees, including the terminal manager, the clerical administrative, an operations manager and perhaps a leadman. (Tr. 1913.)

DeGroot first testified that "to the best of my knowledge and recollection, we reviewed probably every application that was received including the ones from the ITS employees," then testified he had no recollection of reviewing any particular employee. (Tr. 2000.) He then denied that he had any discussions with Lee about the ITS staff. (Tr. 2002.) He then testified that he had no discussion of the predecessor employees' performance. (Tr. 2002.)

Regarding review of the applications, DeGroot testified that he was involved with the review of applications, but then stated Lee reviewed the applications and alone selected candidates for interviews. DeGroot testified that he sat in on "several" interviews. (Tr. 2008.)

D. Barrow Testifies Why Certain ITS Employees Should Not Be Hired by H&M

The ITS employees did not receive regular performance appraisals. However, each week Barrow randomly selected 1 or 2 employees working in the yard to assess safety. He reported safety issues to Lee. (Tr. 1738-1739.) Discipline apparently was rare while ITS was the contractor. At times Cuffee and Wade did not put in the effort into their work (per Jones). Barrow testified that, although he never terminated anyone for attendance, he disciplined Darryl Halsey, Christopher Lucas and Vernon Cuffee for tardiness. Cuffee was frequently late, according to Barrow. (Tr. 1733.) Cuffee also had absentee issues. Cuffee, and perhaps, Lucas, were suspended for these problems. (Tr. 1734.)

[41] H&M contends that Frayne testified that the rail operators' practices are not to keep the employees from the prior operator when taking over a yard. (R.Br. at 15, citing Tr. 150.) Taken into context of the questioning (Tr. 148-150), Frayne testified that it was typical to bring in travelers when H&M took over an operation. When asked why, Frayne speculated "they don't want to keep the same people that were there, maybe." Frayne did not know why H&M did not want to keep the same people there. He testified "they all do it." Then I sustained General Counsel's objection as to why based upon lack of foundation, then H&M asked Frayne why other companies did so. Frayne did not know but later said it was a typical practice, in his experience. As evidenced by testimony from the former ITS employees, a number of them were retained through several different employers. Also see Senteno's testimony, Tr. 161. Under these circumstances, I do not rely upon Frayne's experiences.

Barrow also testified that "bad attitudes," which he said was disrespectfulness, caused problems as well. (Tr. 1747-1748.) Barrow testified that the attitudes worsened with the unionization efforts. Barrow testified that Halsey, Cuffee, and Earl Smith were also disrespectful. Halsey was disrespectful 3 times with Barrow over a period of 5 to 6 years. Cuffee was disrespectful twice. (Tr. 1741-1743.) Cuffee also had problems putting forth effort in his work. Despite these issues, these employees were retained while working at ITS. Barrow testified generally that Norfolk Southern complained only twice about late trains while working for H&M but received complaints about every 3-4 months while at ITS. He testified that employees were disciplined for their actions while at ITS for making trains late but he was always the person receiving the discipline and then he would explain to Le, who would "take appropriate action." (Tr. 1858, 1860-1861.) Barrow never disciplined any one person for these issues but always talked to the crew about it. (Tr. 1861-1862.) He then testified he spoke with Cuffee about using the phone while working and being in the break room causing delays. (Tr. 1863.) Barrow further testified that he would receive complaints from crane mechanic Marcus Hunter about Darryl Halsey operating the crane roughly. (Tr. 1864.)

Barrow testified that Clarke was a good worker. He only had one incident in which he had a conflict with Clarke that he would consider insubordinate. (Tr. 1750.)

Barrow was present when trailer maintenance employee Jordan was disciplined. Lee requested that Barrow sit in a disciplinary meeting within the last year of ITS employment when Jordan was caught sleeping on the job. (Tr. 1759.) Jordan was not terminated.

E. ITS Employees Follow Up on Their H&M Employment Applications

H&M had no documented evidence stating why it did not offer employment to the 11 ITS employees. (Jt. Exh. 1 ¶1.) It had no documents between Anthony Lee and any other H&M agents or supervisor regarding the entire job selection process, including anything regarding the applications themselves, nor any of the applicants. (Jt. Exh. 1 ¶¶3-4.)

On January 24, 2019, Cuffee called the office to speak with Lee about his application. He spoke with Juanita Williams,[42] who told him Lee was not there. Cuffee said he was calling to check on the status of his application. Williams said she would tell Lee to get in touch with him. Cuffee waited another 2 days and called again, this time speaking with Lee. Lee said he would talk to the boss to see if the ITS employees would be hired. Cuffee. hearing nothing from Lee, yet called again. This time Cuffee spoke with Barrow, who told him that H&M was not hiring and would let him know when it was hiring. Cuffee never received a call to work for H&M. (Tr. 1299-1301.)

In February 2019, Ron Spencer had not been called for a job with H&M. He went to the Norfolk Yard office and asked Manager Lee about the status of the application. Lee said, "They ain't going to hire none of y'all back . . . " because the employees tried to organize with ILA. (Tr. 52.) No one else was present for the conversation. Spencer left.

Sometime in February 2019, because he had heard nothing from H&M about his

[42] Williams testified that she not recall anyone who called about the status of their applications. (Tr. 1592.)

application, Lucas spoke with Manager Lee at the Norfolk Yard, outside the office. Lee told Lucas that he had slim to no chance to hire hiring guys back because of the election involving ILA. Lucas, knowing that Lee had no intention of hiring him, did not check about his application any further. (Tr. 518-519.)

When she had not heard from H&M about a position, Clarke called Lee in February 2019. After Clarke initially asked about her application, Lee said to her, "Why are you calling me about your application? Don't you work for the union people?" Clarke again said she was calling about her application. Lee said there were no openings. (Tr. 670.) Clarke did not inquire with H&M again and H&M never offered her a position. (Tr. 670.)

Jones heard nothing about his application, so he followed up on it. He first spoke with Juanita Williams, who told him his application was on file. (Tr. 957.) He also called Darryl Halsey and asked to tell Barrow to call him. He had been unable to get in touch with Barrow and Halsey was already working there. (Tr. 957.) When Smith was able to talk with Barrow, Smith told him he had an application on file and asked whether he had a chance to get a job. Barrow told him at that time, H&M was not hiring. No one ever offered him a job with H&M. (Tr. 957-958.)

A couple of months after completing his application, Rayeon Jordan followed up twice with Manager Lee. In the first instance, Jordan telephoned Lee, who told him no jobs were available. (Tr. 1072-1073.) In the second instance, about 2 weeks after the telephone call, Jordan went to Norfolk Yard and spoke directly with Lee. Lee again said no jobs were available. (Tr. 1073.) About July 2020, Jordan completed another application for employment with H&M. This time, Terminal Manager Barrow told him that he would contact him if anything was available. To the date of the hearing, no one from H&M offered Jordan a job. (Tr. 1074.)

Ernest Perry never heard from H&M and never checked. (Tr. 1358.) He presumed he would not be hired because of the way that Lee treated the employees and because he had the least seniority. (Tr. 1368.) He never received any disciplinary action. (Tr. 1369-1370.)

After Lee's death and Barrow's promotion to terminal manager, Barrow hired some of the former ITS employees. In November 2019 H&M hired Spencer as a groundman. Spencer talked to Barrow about an opportunity. Spencer later called Darryl Halsey, who was still working in the Norfolk Yard. Halsey told Spencer that help was needed and that Barrow would hire Spencer as a ground man and to work in the hostler trucks. Spencer then called Barrow, who directed him to get an application, complete it and give it to Alan Young. Approximately two weeks later, Spencer began working again at the Norfolk Yard, the Monday before Thanksgiving. (Tr. 53-54.) Spencer noted that the only difference in his groundsman duties from ITS to H&M was that ITS used 2 groundmen and now he was the only groundsman working the train. (Tr. 56.) When he started at H&M, the Teamsters represented the employees. He received no training when he began work for H&M. (Tr. 60.)

McManus never received an interview or heard from H&M about his application. He did not make any inquiries about his application either. (Tr. 1143-1144.) When Barrow was asked why he never contacted McManus, Barrow testified that he heard a rumor that McManus was working at an ILA shop and he could not compete with the pay.

F. H&M Immediately Begins to Hire Individuals Who Did Not Work for Predecessor ITS

In spite of DeGroot's testimony that he preferred to hire persons who previously were not in the industry, he also testified that he would apply the criteria (as above) to anyone who worked in the industry before. He admitted H&M hired individuals who had experience in the industry, because everything is on a "case-by-case basis." (Tr. 1969.) Two employees hired almost immediately who were not employed by predecessor H&M were Martin Costello and Larry Aughtman: Both had experience in the industry. (Tr. 1969-1971; GC Exhs. 130-137.) Similarly, James Cofield, who applied on February 13, 2019 and was hired on March 21, 2019, had approximately 7 years' experience in the industry as a yard jockey. (GC Exh. 138.)

When Barrow became the terminal manager after Lee's death, he also began to hire some of the former ITS employees. He stated that his hiring criteria were the character of the individual, pleasant attitude and work ethic. (Tr. 1750-1751.)

Initially Halsey did not check back with H&M about his application because he obtained employment elsewhere. (Tr. 588.) However, his brother Jermaine Collins later told him that H&M needed a crane operator. Halsey spoke with Barrow about employment about August 2019 and, about a week after Halsey made an application, Barrow hired Halsey as a crane operator. (Tr. 632.)[43] His crane operator duties and the crane itself were unchanged from when he worked at ITS. (Tr. 588-589, 636.) He received no training when he was hired by H&M. (Tr. 598.) When he worked at ITS, only two operators were working---Halsey and Carlos Jones. Now there's only one crane operator and if he has a day off, Barrow has to work on the crane. He is supervised now by Boone.

Halsey admitted that people were late at time, up to 30 minutes, but was understandable because they were working 6 and 7 days per week. (Tr. 634.) He currently works with David Wade, George Binns, James Cofield, and Stefon Barclift. (Tr. 634.)

Alan Young no longer works at the facility but was a supervisor while he was there. (Tr. 593.) He's had interaction with someone from the Teamsters who has repeatedly asked him to sign a card to join, which Halsey declined. (Tr. 595.) Alan Young performed load planning duties in addition to gate clerk duties. (Tr. 885-886.) The Teamster person is allowed on the property, in the office. (Tr. 603.)

Barrow hired Carlos Jones, who worked in the Norfolk Yard for H&M from November 2019 until September 2020. (Tr. 59, 804-805, 1772.) Jones left employment with H&M to pursue a better job. Barrow and Halsey notified Jones that H&M was short staffed and needed another operator. (Tr. 857.) Jones completed an application and underwent drug testing and a background check. (Tr. 858.) His duties as an operator were no different than his previous employment. (Tr. 858.) He received no training. (Tr. 858.) If he was not working as an operator, he drove a yard jockey. (Tr. 859-860.) When H&M hired him, he found that the team worked well but the team had 2 employees who

[43] Barrow testified that, although Halsey was a good crane operator, he had problems with attendance and attitude. When he was interested in hiring Halsey, Barrow stated they had a discussion about these issues and if Halsey would "be good." (Tr. 1756.) Barrow still finds that Halsey has "small issues" on attendance or tardiness. (Tr. 1758.)

were still learning because they had never done this type of work before. (Tr. 821.) He reported to Barrow. (Tr. 861.)

Wade, Young and Halsey were still employed in yard operations. Jermaine was a driver mechanic and Marcus was a truck mechanic. (Tr. 862.) Spencer was later hired as a groundsperson. (Tr. 887.) Carlos Jones worked at facility for 20 years, "off and on"

leading on disruptive that he came and went and he was a trainer on the yard jockey and cranes. He hired him at H&M. (Tr. 1770.)

As of the hearing date, Spencer worked with a number of employees he previously worked with at ITS: Marcus Hunter; Jermaine Collins; Darryl "Chop" Halsey; and David Wade. (Tr. 58.)

G. H&M Refuses to Recognize ILA Local 1970

Kevin Basnight attempted to speak with Terminal Manager Lee at the Norfolk Yard after he discovered what happened to the former ITS employees. When Basnight went to the Norfolk Yard, Lee called the railroad police to remove Basnight. (Tr. 1652-1653.)

By letter dated January 31, 2019, Basnight demanded that H&M bargain. (GC Exh. 11.) Having no response, Basnight telephoned Connors about ILA recognition and bargaining. (Tr. 1658.) Although Connors told Basnight he would meet with him, it never happened, nor did H&M recognize or bargain with the ILA Local 1970. (Tr. 1655-1656.) Connors admitted that even if he had known ILA was the bargaining representative with the predecessor, he still would have instead recognized the Teamsters.

H. H&M Hires Additional New Employees

Martin Costello worked for H&M from January 2019 until October 2019. He applied for a job with H&M at the Norfolk Yard on January 23, 2019, between 8:00 and 9:00 a.m. (Tr. 739, 743; GC Exh. 134 at 800.) Costello knew Manager Lee for 20 years and had heard about the job through his stepson, Matt Howie, who worked at the yard. Costello was unemployed at the time and had terminal manager experience in container depots and ports but not in a rail yard. (Tr. 776-777.) While he filled out his application in the gate office, Larry Aughtman and Holmes also completed applications. (Tr. 740-741.) Costello saw Lee, Connors and DeGroot in the office. After Costello finished his application, he handed it to Lee, who handed the application to DeGroot. (Tr. 745.) About 2 minutes later, DeGroot brought Costello into a small room and asked him a few questions about money and prior experience, then told him he was hired. (Tr. 742.) DeGroot did not ask whether Costello had any licenses or certifications. (Tr. 743.) Lee told Costello to come in the next morning. (Tr. 743.) Although Costello was hired as a crane operator, H&M did not send Costello for drug or alcohol testing. (Tr. 743, 745.)

On January 24, Costello reported to Lee in the break room and then worked with Page, who was present from Chicago. (Tr. 745-746, 766.) Costello initially was trained to perform ground work with David Wade. (Tr. 747.) After a few days, Costello started driving the yard jockey. He was checked off on his driving and backing up before he was allowed to drive to the rails, which only took about 2 days. (Tr. 747, 752.) Costello was trained on the crane for approximately 1 week. He was never told when his training was

over but assumed it was over because he was allowed to operate the crane himself. (Tr. 753.)

Larry Aughtman began to work at the Norfolk Yard on February 1, 2019. (Tr. 1228.) He heard about an employment opportunity at the Norfolk Yard from his wife's cousin, who told Aughtman to go Norfolk Yard immediately to see about the job. (Tr. 1230-1231.) Before working for H&M, Aughtman's most recent employment experience was a project manager and safety coordinator for a fire safety company. (Tr. 1230.) Aughtman had some experience operating cranes, but those were unlike the ones at H&M. He had no groundsman experience. (Tr. 1256-1257.) Aughtman arrived and spoke to Barrow, who called Manager Lee on the phone. Speaking with Aughtman on the phone, Lee told Aughtman that he would be in contact with him when to come to the yard to complete some paperwork and some people would be terminated; Lee instructed him not to return to the Norfolk Yard until contacted. They did not discuss for what position Aughtman would apply and Aughtman did not know who the employer was. (Tr. 1233-1234.)

About a week later, on January 23, 2019, Lee telephoned Aughtman to come to Norfolk Yard to complete and application and paperwork for background check and drug testing. Aughtman took about 15 minutes to arrive at Norfolk Yard. Lee interviewed him for about 15 minutes and asked whether Aughtman would be interested in working as a crane operator instead of a driver. They also discussed salary. Aughtman then went into the main office and Juanita Williams gave him the necessary paperwork. (Tr. 1235-1237.) Aughtman went to the breakroom to complete the paperwork. While completing his paperwork, Aughtman met Marty Costello,[44] who said he was also to be hired as a crane operator. During his entire tenure with H&M, Aughtman never talked to DeGroot. (Tr. 1247.)

Aughtman heard about ILA from Costello and from Manager Lee. Within a few days after Aughtman began employment, Aughtman asked Lee why everyone was a new hire, which led to a conversation about ILA. No one else was present. Manager Lee said the guys from before he was hired were terminated for trying to bring in ILA behind his back. Nothing else was said in this conversation, which took place outside of Lee's office. (Tr. 1254-1256.)

When Aughtman started work, he first received training from Page as a groundsman for up to 2 days. Page and another Chicago traveler trained Aughtman on driving the yard jockey truck. Aughtman moved to training on the crane after Costello completed his training. (Tr. 1244.)

Within 1 to 2 days of starting at the facility, Manager Lee told Aughtman and the other trainees to pay attention to what the traveling H&M employees told them, "because it'll be our yard in a few weeks because they were going to be leaving." (Tr. 1249-1250.)[45] In the same time period, in the breakroom, Page talked to Aughtman and Marty Costello about having the union represent the employees in Norfolk Yard. Aughtman had no experience with unions and asked what would happen if he did not want to be in the union. Page told him he could not work there if he was not be in the union. (Tr. 1250.)

[44] Costello identified the date aas January 23.

[45] Aughtman testified that Lee said the period the Chicago employees would stay would likely be "a month or so."

When the Chicago employees left, 6 yard employees handled Norfolk Yard's entire workload, requiring the employees to work 7 days each week. (Tr. 756, 795.) Costello, Aughtman and Holmes worked the crane. The yard jockey operators were Binns, "JC", and David Wade (Tr. 756.) The employees operating the yard trucks also performed groundsman work, as no one in particular was assigned the ground work. (Tr. 756.)

I. Teamsters Local 822 Collects More Authorization Cards

Shortly after recognition, Wright assigned Jacobs to be the business agent for the H&M bargaining unit. (Tr. 1499-1500.) Jacobs recalled going to Norfolk Yard to sign up additional employees and, over time, eventually receiving 11 more authorization cards. (Tr. 1547-1554; GC Exh. 51.) Costello testified that Page and the other Chicago employees told the new hires that a Teamsters representative would meet with them. (Tr. 757.)

Jacobs testified he had a practice of signing up employees, even the same ones, for the union after recognition. Jacobs testified that, after H&M and Teamsters Local 822 negotiated a collective-bargaining agreement, he met with employees Norfolk Yard's break room on more than one occasion. Terminal Manager Lee permitted him access so long as he did not meet with employees during working time. (Tr. 1520.) On the subsequent visits, he obtained cards from employees on a second visit because he wanted 70% of the employees to have signed up. In all, Jacobs testified he obtained 10 - 11 cards in all because he wanted a 70% showing of interest. He used the same type of cards he used for the traveling H&M employees. (Tr. 1532-1533.) About 3 to 4 of these cards, Jacobs testified, were mailed to the Teamsters Local 822 office. However, the evidence reflects that when Jacobs obtained more cards at the Norfolk Yard, none were the same as the original traveling H&M group. Holmes was selected as the shop steward.

Jacobs continued to collect Teamsters Local 822 authorization/membership cards until about August 2019. Afterwards, Teamsters Local 822 continued to obtain membership and dues check-off cards. (GC Exh. 51.) The following table represents the cards Teamsters Local 822 obtained in 2019 other than the traveling employees:

Date card signed	**Name**	**Position**	**Hire Date Listed on Card**
February 20	George Aughtman	Operator	Initially listed as 1/28/19, cross off and 2/1/19 put in
February 20	Rosalend Boone	Clerk	1/29/19
February 20	Jermaine Collins	Trailer Mechanic	1/23/19
February 20	Latifah Bright	Clerk	1/30/19
February 20	Martin Costello	Operator	His entry changed to 1/26
February 20	David High	Groundsman	1/28/19
February 20	Derrelle Holmes	Operator	Hire date changed from 1/29 to 2/4
February 20	Marcus Hunter	Mechanic	February 8
February 20	David Wade	Driver	1/28
February 21	Aaron Stores	Gate Clerk	Left off

Date card signed	Name	Position	Hire Date Listed on Card
February 22	Alan Young	Lead Gate Clerk	1/23/19
March 1	John Smith	Left off	1/30/19
No date	James Cofield	Left off	3/9/19
March 11	George Binns, Jr.	Driver	3/1
March 11	Ernest Holmes	Groundsman	2/28
May 14	Carletta Riddick	Left off	5/14/19
May 16	Kenneth Bollyard	Mechanic	4/4
September 24	Ronald Hodge, Jr.	Mechanic	6/1/19
September 24	David Proffitt	Operator	Left off
September 25	Steven Rodriguez	Trailer mechanic	7/29/19

Teamsters Local 822 did not receive any dues from any H&M employees still on the payroll until July 2019. Sawyers presumed that the dates were correct but was not present when the cards were signed. (Tr. 401.)

By the time of hearing, H&M employed 4 gate clerks, none of whom were previously employed by ITS: Latifah Bright was hired on January 30, 2019; Carletta Riddick was hired on May 14, 2019; Jasmine Moore was hired on August 31, 2020; and Jamal Boone was hired on October 14, 2019. Rosalend Boone, now in management was hired on January 29, 2019 as a gate clerk. Crane operators Larry Aughtman was listed as starting February 1; Darryl Halsey was supposedly hired August 19, 2019. Groundsmen were hired with David Wade officially beginning on January 28, 2019. Wade is now called lead switcher, as is Ron Spencer and Stephon Barcliff. Collins worked as a mechanic and was soon working with Hunter. H&M also had hired another groundsman in late January 2021. (Tr. 1864-1872; R. Exh. Q.)

Between January 23, 2019 and the beginning of this hearing in January 2021, H&M had a turnover of 16 employees.[46] Young, who had been hired on January 23, 2019 and promoted after Barrow was promoted to terminal manager, was barred from the Norfolk Yard by Norfolk Southern after outside drivers lodged multiple complaints with Norfolk Southern. Because Young could no longer be permitted on Norfolk Southern property, he was effectively terminated. (Tr. 1818-1819.) These complaints existed when Young worked for ITS; whether Lee ever disciplined Young for those complaints was unknown. (Tr. 1820-1821.) Young's employment therefore ended on July 13, 2020. (R. Exh. R.)

Costello, the crane operator hired on January 23, 2019, left in July or August 2019. John Orlando Smith, hired January 31, 2019, failed his background check and was let go as of April 23, 2019. (Tr. 1880; R. Exhs. R, Y-25.) David High, hired effective February 8, 2019 as a groundsman, was terminated approximately 1 month later when he failed his drug test. (Tr. 1822-1823.) He was not replaced with a specific groundsman hire and instead yard jockeys performed most of the groundsman duties until November 2019, when Spencer was hired. (Tr. 1824-1825.) Ernest Holmes, a groundsman hired February 28, 2019, quit on May 5 of that year, telling Barrow the job was not for him. (Tr. 1823-1824, 1877; R. Exh. R.) Aaron Scott Stores, hired February 7, 2019 as a gate clerk, was terminated with job abandonment/no call no show on September 12, 2019. (Tr. 1882; R.

[46] This number does not include Lee.

Exh. R.) Edward Lucas was hired on February 14, 2019 and "laid off" 13 days later for failing to have a valid driver's license, which was necessary to operate the yard jockey. (Tr. 1985-1986.)

Quadarius Cuffee was a trailer mechanic who left for better pay. Ronald Hodge was hired about June 2019 for a trailer mechanic and had a difficult commute, so he left to find something closer to home. Darelle Holmes ended his employment, after being hired about June 2019 when he walked off the job. (Tr. 1876.) Steven Rodriguez was a trailer mechanic who hired in October or November 2019 and left to return to his previous employment. (Tr. 1879.)

More groundsmen were hired in November 2019 was due to an increase in freight volume. (Tr. 1826.) John Stephens was hired in late 2020 or early 2021 as a power mechanic and stayed only a week. (Tr. 1880.) Breon Steward was also hired about February or March 2019 but never started work with H&M. (Tr. 1881.) Despite the turnover in mechanics, Barrow never considered calling McManus: Barrow heard from a friend that McManus was working at a trailer shop under the ILA and assumed he could not afford McManus. (Tr. 1884.)

CREDIBILITY

A. H&M Management

Connors was the corporate representative throughout the hearing. On the second day of hearing he admittedly asked DeGroot a question about an issue presented at hearing, despite a sequestration order in effect. Respondent hangs its hat on Connors' admission as evidence of Connors's trustworthiness. I find this admission to be a thin reed for reliance.

Regarding the discussion with Connors regarding hearing, DeGroot had little recollection about his conversation with Connors in which the sequestration order was violated. (Tr. 1951-1952.) When he testified, DeGroot essentially denied that anyone discussed any testimony of the hearing with him. He admitted he spoke with Connors every day, but did not recall particularly the specifics. Based upon Connors' admission the morning after his conversation with DeGroot, I find DeGroot's recollection conveniently lacking. Violation of a sequestration order may warrant striking the tainted testimony if a party is prejudiced by the violation. *Suburban Trails*, 326 NLRB 1250 n. 1 (1998) and cases cited therein. Based upon my subsequent findings regarding the credibility of Connors's and DeGroot's testimony, I find General Counsel was not prejudiced by the violation.

Connors's testimony had internal and external inconsistencies throughout his testimony. As an adverse witness earlier in the hearing, Connors had little recollection of what was in the bid package and answered beyond the scope of questions on cross-examination. (Tr. 290-291.) Late in the hearing, during his direct on behalf of H&M, Connors testified in more detail about the negotiations with Norfolk Southern. (Tr. 1197-1199.) In addition, Connors testified that DeGroot talked with Norfolk Southern about staffing plans, but Norfolk Southern's Eric Fonville testified in a forthright manner, about the negotiations with H&M and had little, if any, lapses in memory. I therefore credit Fonville over Connors about the H&M's negotiations and staffing plans for the Norfolk Yard.

Similarly, Connors provided little detail about reaching a card check agreement with Teamsters Local 822. Connors also could not recall that, during a conversation with ILA President Basnight, that Basnight requested recognition. Respondent did not ask him about Basnight's letter, which demanded recognition. I credit Connors's admission that, even if he knew about ILA's representation of predecessor's employees, he still would have recognized the Teamsters.

Connors danced around the issues that he was aware that ILA Local 1970 represented the ITS employees before he recognized Teamsters Local 822. When asked if he attempted to discover whether the employees at Norfolk Yard were unionized, Connors answered, "I didn't speak to any of the employees, no." (Tr. 2058.) When asked whether he asked whether he instructed DeGroot to find out whether the employees were represented, Connors answered: "As far as I know, there was no ---- what I was told, there was no agreement. As far as I know, ITS, and we found this out later, and I can't say when, didn't even start negotiations." (Tr. 2058.) When asked at what point he discovered the employees at the Norfolk Yard had been represented by ILA Local 1970, Connors diverted with this testimony:

> . . . I can't remember particularly when but I can say that because of my stipulation in the contract with the Teamsters, I'm obliged to speak to them on their representing any terminal that we're awarded. We had taken over some terminals that were different Teamsters locals that we brought in 710.

(Tr. 2058.) Connors then admitted that all facilities where he was obliged to speak with Teamsters Locals 710 and 705 were in Chicago only. (Tr. 2058-2059.) Based upon Connors's evasive answers, I conclude that he and DeGroot knew that ILA Local 1970 represented the ITS employees at Norfolk Yard before January 23, 2019 and likely knew when he invoked the after-acquired clause in the Teamsters Local 710 agreement.

Respondent contends that DeGroot should be credited in full because his testimony was supported by Teamster 822's witnesses, "who testified that they did not have any communication with DeGroot at any time and further testified that they would never meet with employees in the presence of management." (R. Br. at 51.) Of course, this statement ignores that some of the traveling H&M employees testified about DeGroot's presence and instructions. I also find that Teamsters Local 822's testimony, as well as DeGroot's, is this portion of events is self-serving in light of the testimony of the H&M employees and undeserving of credit.

DeGroot testified that he had no knowledge of H&M's voluntary recognition of Teamsters Local 822 until Connors told him. (Tr. 1998-1999.) This information contradicts Connors's admission that DeGroot told him that Teamsters Local 822 had a sufficient number of cards.[47] I credit the admission.

At hearing, Respondent argued that DeGroot routinely provided the address of the facility so that the traveling employees could find the location. (Tr. 1953.) DeGroot also denied that he did not witness any employees completing authorization cards for the Teamsters. Again, this testimony was directly contradicted by some of the traveling

[47] Connors was somewhat equivocal about this admission. Based upon the testimonies of the few traveling employees that DeGroot was present, Connors's admission is corroborated to the extent of how DeGroot likely knew a sufficient number of traveling employees signed cards.

employees. In addition, Connors admitted that he asked DeGroot about whether enough cards were obtained. Crediting Connors's admissions and the traveling employees, DeGroot must have been present at the hotel breakfast on the morning of January 23 to know that a sufficient number of traveling employees signed cards on.

DeGroot also testified on direct examination that he preferred to hire "inexperienced" persons who would not have learned "bad habits" in the rail industry. He testified that he had problems with employees who worked for competitors, such as ITS. (e.g., Tr. 2016.) However he also testified that he had no problem when Barrow, as terminal manager, hired predecessor ITS employees from the Norfolk Yard. (Tr. 2014.) H&M did not reconcile these discrepancies.

On cross-examination, DeGroot then admitted to hiring a number of new employees at the Norfolk Yard and said it was on a "case by case" basis. As a result, I discredit DeGroot's explanations about the hiring criteria. Additionally, DeGroot initially testified that he was in charge of hiring and seemed to minimize Terminal Manager's Lee role, but on cross-examination admitted that Lee was involved every step of the way. I therefore credit the admission against interest, that Lee was involved throughout hiring. These admissions demonstrate that DeGroot tailored these areas of testimony, which demonstrates generally a lack of credibility. *United Parcel Service of Ohio*, 321 NLRB 300, 321 (1996).

Similarly, I discredit DeGroot about the review and determination not to hire the ITS employees. DeGroot claimed he had no particular recollection of reviewing the applications of the ITS employees but hired Lee because Norfolk Southern had no problems with Lee and said that Lee was doing a good job with the yard. When asked whether Lee was performing this job by himself, he admitted Lee had done the job with the support of other employees. He said Lee had leadership skills; when asked whether Lee was successful with his ITS employees, DeGroot evaded with: "I don't know the exact details of how successful ITS was or wasn't." (Tr. 2001-2002.)

DeGroot testified that "to the best of my knowledge and recollection, we reviewed probably every application that was received including the ones from the ITS employees," then testified he had no recollection of reviewing any particular employee. (Tr. 2000, 2007.) DeGroot then denied that he had any discussions with Lee about the ITS staff, or any discussion about their performance. (Tr. 2002.)

DeGroot defined attitude as a "positive attitude" or upbeat and morale would be the general attitude of the facility as a whole. (Tr. 2003-2004.) He maintained that he had no information about any attitude or morale while Lee managed the ITS facility. (Tr. 2004.) Upon reviewing the ITS employees' applications, first testified that he did not discuss the attitude of these employees specifically with Lee, he did not recall whether he generally discussed attitude of these employees with Lee. (Tr. 2007.)

DeGroot's testimony, discussing hiring persons who had experience in the industry, again demonstrates that the testimony is tailored to the facts H&M wanted presented. It is difficult to believe that, if Lee was involved every step of the way, Lee and DeGroot did not discuss the former ITS employees, particularly where attitude and attendance were at issue. However, he recalled Hunter supposedly taking a transfer with ITS but returning on February 9, 2019. Because DeGroot's testimony here is evasive at times and contradictory at others, I only credit any admissions against interest.

A number of the traveling employees disagreed with DeGroot's statements that these employees would stay as long as needed. Several traveling employees stated that their length of stay would only be 2 weeks. Barrow testified that the traveling employees only stayed 2 weeks. No record evidence shows that any stayed longer than one month. Only 1 employee, Darvalics, testified that he returned for a period of 1 week. Aughtman testified that Lee told him these employees would only stay one month. I therefore discredit that the traveling employees had any open-ended time to stay at Norfolk.

I partially credit Barrow's testimony. He demonstrated thorough knowledge of the operations at the Norfolk Yard and was forthright that the duties and work at the yard did not change between ITS and H&M. However, H&M led Barrow in certain areas during H&M's direct examination. For example, Barrow testified that DeGroot discussed his new job role and salary with him on January 23, 2019. Respondent then asking the leading question, whether he believed DeGroot was the hiring manager. Of course, Barrow said yes. (Tr. 1793-1794.) Barrow's belief for his own job does not stretch to the yard employees, maintenance or gate clerks as these employees testified that they found out from Lee about their employment.

H&M also led some of Barrow's discussion of his hiring criteria. It first raises work ethic as an important issue, then asks what he looks for, and of course work ethic is part of the answer. In paraphrasing Barrow's answer back, Respondent states attitude and work ethic are the answer and omits "character," then asks if those are the most important things, which Respondent has essentially telegraphed to Barrow. (Tr. 1749-1750.) As a result, this portion of Barrow's testimony is discredit. *NLRB v. Consolidated Biscuit Co.*, 301 Fed. Appx. 411, 435-436 (6th Cir. 2008), enfg. 346 NLRB 1175 (2006). Respondent also led Barrow about reasons why he hired certain employees. (See, e.g., Tr. 1878-1879 about why Rodriguez was hired, due to an increase in work.) See, e.g.,: *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 15 fn. 16 (2019) (testimony to direct questions that have broad hints and suggestions about answers or answers are not credible); *Woodline Motor Freight, Inc.*, 305 NLRB 6 (1991), affd. 972 F.2d 222 (8th Cir. 1992).

As to why a number of the ITS employees were not hired for H&M, Barrow previously testified that he did not have input on the decision and did not discuss it with Lee. Barrow then testified regarding attitudes and work habits of certain employees that he would not hire and implied that Lee had reason not to hire H&M relies upon this testimony to assert why these employees were not hired *ab initio*. I cannot conclude that, after years of retention, through a number of employers, for most of these employees, that the reason they were not hired was because of "attitude."[48]

[48] An example is Clarke: Barrow previously testified she was a good employee, was only insubordinate to him once (and when is unknown), but Lee had issues with her. (Tr. 1751.) Similarly, Barrow testified that he would not have hired Cuffee because he was lazy and did not participate as a team member. Barrow testified that, in his experience as a hiring manager and his experiences with Cuffee, he would not hire Cuffee. (Tr. 1753.) Barrow sat in on one disciplinary action for Jordan and concluded that Jordan was lazy. He did not supervise Jordan and this incident was the only basis for determining he would not have hired Jordan. (Tr. 1959-1960.) He once observed that Mark Keating, a yard jockey driver, called Lee "a broke dick," and otherwise heard rumors about Keating's conduct. On the other hand, he testified that he would hire Keating. (Tr. 1762-1763.) He testified that he knew Lucas for 10 years; he found Lucas was "average" and did not volunteer for any additional tasks, and therefore would not hire him based

Barrow also testified that he spoke with Carlos Jones about promising to stay at the job with H&M if he was hired. (Tr. 1771-1772.) Barrow further testified that Jones had a history of leaving the job and H&M contends that this testimony is uncontroverted. This assumption is incorrect because Jones testified to his employment history at Norfolk Yard and his employment application lists only one gap in his employment, which he explained on the record. (GC Exh. 16 at 98.) I therefore do not credit Barrow's testimony about his discussion with Jones about conditions on employment with H&M.

B. Traveling H&M Employees

Most of the traveling employees testified honestly. However, none of them knew why their cards had January 17, 2019 as the date they signed. I do not credit any speculative testimony.

Page sometimes provided vague and misleading testimony, even about the length of time he worked for H&M. He first said 22 years, then 26 years; he first failed to mention that he had a gap between his time in Long Beach and Chicago, then eventually said it was years. While he demonstrated a good understanding of his training process, he otherwise was long-winded yet surprisingly vague. He testified that sometimes he would have the option to stay at a facility when he assisted but other times did not. He testified sometimes he would tell his boss if he had any issue with staying for a certain period. (Tr. 1443.) He was temporally challenged on when events occurred. He saw that he signed the Teamsters card in January 2019, placing events at that time, but repeatedly said that the events took place 3 to 4 years ago. His card matches the date signed by other Chicago employees, not the date the new H&M employees signed in the breakroom. I therefore find that his statements related to when events occurred cannot be relied upon. His denial about talking to the other employees rings false compared to Aughtman's testimony that Page was quite verbal about it.

C. Witnesses from Teamsters Local 822

Wright's testimony of the events leading to recognition of Local 822 shifted. He stated that he did not recall what form the card check agreements with H&M took because he did not have a lot of card check agreements. Wright specifically recalled talking with Teamsters locals in Chicago and South Carolina about H&M and Connors, finding him "labor friendly," but within the same time period had little recollection about the card checks. (Tr. 460-461.) He excused his recollection because he did not deal with card checks on a daily basis. (Tr. 431-432.) Yet one would think that, because he did not have card checks on a regular basis, Wright might have taken more care to remember what he was doing. When asked what he did with the signed cards, at first Wright testified he sent

upon his experience as a hiring manager and based upon his attendance. (Tr. 1763.) Barrow testified honestly that he had not worked with McManus and had no knowledge of any severe work issues. (Tr. 1766.) He thought Perry was a "solid worker" and "would have hired him." (Tr. 1766-1767.) He would not hire Smith because Smith, in his opinion, was rough on the equipment and in 2 instances, resulting in rear axles of trucks breaking. Other examples of equipment abuse was "chatter" from the maintenance employees and as a result, he would not hire him. (Tr. 1768-1769.) He admitted he would have hired Spencer but heard that Spencer once had a "shouting match" with Lee. (Tr. 1772-1773.) However, nothing concretely shows why H&M initially did not hire Cuffee, Jordan, and others. I therefore cannot credit this portion of Barrow's testimony for reasons why H&M did not initially hire these employees. .

the cards to the Board. After changing his answer, he thought he may have sent H&M a copy "or at least sent them a letter and a copy of the cards . . . ." (Tr. 431-431.) This testimony is externally inconsistent with the testimony of Connors and DeGroot, who maintain they never saw the signed cards and the subpoenaed documents from Teamsters supporting this contention were not provided to General Counsel. He became hostile when he was confronted with documentary evidence that contradicted his previous testimony. I discredit much of Wright's testimony due to selective and shifting recall.

Jacobs is partially credited. He stated that he met with the H&M employees before recognition at a hotel, but then testified he and Sawyer met with the employees in a conference room at the hotel[49] and opined it was likely that Teamsters 822 paid for that room. He also testified that none of the employees were eating breakfast. (See, e.g., Tr. 1536-1538.) This testimony is in conflict with the H&M traveling employees, who testified that they were in the breakfast area of the hotel, so I cannot credit this portion of his testimony. Jacobs also assumed none of these people were staying at the hotel, but admitted he had no proof. (Tr. 1501-1502.) He also testified tentatively about how the meeting at the hotel was set up, stating: "I think [Sawyer] did it. He picked a date and stuff." However, Sawyer testified he was directed to the hotel by Wright. (Compare Tr. 1507.) Jacobs also denied that Connors was present while the employees signed cards at the hotel, but them admitted that he never met Connors. He admitted he never heard of DeGroot either and would not recognize him. (Tr. 1542-1543.)

Sawyer initially denied seeing the cards and requesting recognition from H&M. He became defensive when confronted with the email in which he demanded recognition. (GC Exh. 48.) He also could not recall how many individuals signed cards. He also had no recollection of getting a response from Connors. (Tr. 361-362.) This testimony is largely discredited.

D. H&M's Hires for Norfolk Yard

I partially credit Young. Some of Young's testimony shifted at times. In one example, he testified that no one asked him about attending union meetings, and then testified that a few of his fellow employees asked him why he was not attending the meetings. I credit that he told Lee he intended to vote "no." (Tr. 1042.) Young also testified confusingly about which union was present when H&M was the employer at Norfolk Yard and who gave him a card for Teamsters Local 822. He maintained that McManus gave him a card, but McManus never worked for H&M. (Tr. 1033-1034.) Young later testified that he signed an application for Teamsters membership and the dues checkoff form after confronted with the document; however, he again said Mike McManus, who was not employed at the facility at the time, filled out the top portion of the cards and gave him the card. (Tr. 1036-1038; GC Exh. 51.)

General Counsel also directly asked Young whether employee David Wade said anything about how he was going to vote in the union election. Young evaded the question and said a majority of the employees "whispered out" that they intended to vote for the union. (Tr. 1012.) He then specifically denied hearing how Marcus Hunter or Jermaine Collins intended to vote. (Tr. 1013.) In comparing these answers, I infer that not only did

[49] Jacobs testified he did not review a receipt for the hotel room in preparation for his testimony. (Tr. 1545.)

Young know how Wade intended to vote, but Wade, who remains employed by H&M, verbalized that he intended to vote against unionization.

I was impressed with Larry Aughtman's candid testimony. He was forthright and testified to facts in a consistent manner. He also testified against his employer's interest. As a current employee testifying against her own pecuniary interests, I find his testimony particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc*., 197 NLRB 489, 491 (1972).

ANALYSIS

In examining the allegations presented, I will first discuss the allegation that Respondent violated Section 8(a)(1) when Lee told employees that he would not hire them at H&M because of their prior union activities. I then discuss whether H&M unlawfully recognized Teamsters Local 822, in violation of Section 8(a)(2). I then discuss whether H&M was a successor to ITS; finding that it was a successor, I deal with what type of successor H&M became. This discussion includes issues of discriminatory hiring and subsequently whether Section 8(a)(5) was violated.

I. SECTION 8(A)(1) ALLEGATION (COMPLAINT ¶11)

A. Applicable Law

Statements that have a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Section 7 rights, when taken in context, violate Section 8(a)(1). *Cascades Containerboard Packaging—Niagra, A Division of Cascades Holding US Inc*., 370 NLRB No. 76 (2021). These statements are assessed in the context in which they are made and whether they tend to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). The standard for assessing alleged Section 8(a)(1) threats is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Any subjective interpretation from an employee is not of any value to this analysis. *Miami Systems Corp*., 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). Threats of reprisals for engaging in protected concerted activities are coercive. *Castro Valley Animal Hospital, Inc*., 370 NLRB No. 80, slip op. at 17 (2021) and cites therein.

B. Manager Lee's Statements Are Not Hearsay

Credited testimony demonstrates that, in February 2019, when Lucas asked Manager Lee about the status of his application with H&M, Lee told him that he would not be hired because of his union activities with ILA while employed at ITS. Other former ITS employees similarly testified to the same statements. Aughtman also testified that Lee told him that the ITS employees were not hired because of their activities on behalf of ILA.

Although Lee was unavailable due to his demise, his statements while employed by H&M are not hearsay pursuant to Fed. R. Evid. 801(d)(2). That rule states:

> **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**
>
> **(d) Statements That Are Not Hearsay**. A statement that meets the following conditions is not hearsay:
>
> . . . .
>
> ***(2) An Opposing Party's Statement***. The statement is offered against an opposing party and:
>
> > (A) was made by the party in an individual or representative capacity;
> > (B) is one the party manifested that it adopted or believed to be true;
> > (C) was made by a person whom the party authorized to make a statement on the subject;
> > (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> > (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
>
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Lee was an admitted supervisor for H&M. He had authority to hire employees and did so. He made the statements in his representative capacity and surely believed he had the right to determine who to hire or in this case, not hire. Lee expressed the reasons why he would not hire a number of employees who worked for ITS: The employees' prior unionization activities while they worked for ITS. He made this determination and verbalized it as a person who was authorized to make hiring decisions. Thus, per Fed. R. Evid. 801(d)(2)(A) through (D), Lee's statements are not hearsay. His statements constitute admissions against interest. This finding is consistent with years of Board precedent. See, e.g., *Teamsters (Ind.) Local 560 (Pennsylvania R.R. Co.)*, 127 NLRB 1327, 1243 (1960) (agent's statement removed from hearsay because admission against interest). Also see *Meyers Transport of New York, Inc.*, 338 NLRB 958, 969 (2003) (Board accepts hearsay testimony if rationally probative and corroborated by something more than the "slightest amount of evidence").

C. Analysis of Lee's Statements for §8(a)(1) Violation(s)

General Counsel alleged only one statement as a Section 8(a)(1) violation. However, the testimony from both former ITS employees and Aughtman give specific statements why H&M did not hire the alleged discriminatees. When Lucas checked on the status of his H&M application, Lee told Lucas that he had slim to no chance to hire hiring guys back because of the election involving ILA. When Clarke checked on her H&M application, Manager Lee said to her, "Why are you calling me about your application? Don't you work for the union people?" Lee then told her that he was not hiring. Lee also told a former employee that because the employee "screwed" him over, Lee now was

going to screw him over. This statement is similarly to "stabbing" someone in the back and then doing to same when the opportunity arises. See generally *Treanor Moving & Storage Co.*, 311 NLRB 371, 373-374 (1993). These statements are consistent with Lee's statement to newly hired Aughtman: In early February 2019, shortly after Aughtman began his employment, Aughtman asked Lee why everyone was a new hire, which led to a conversation about ILA. Manager Lee said the guys from before Aughtman was hired were terminated for trying to bring in ILA behind his back. Nothing else was said in this conversation, which took place outside of Lee's office. (Tr. 1254-1256.)

Respondent argues that Lee's statements are protected by Section 8(c) of the Act, that Lee made no threats or promises and "placed no blame on the Union for withholding any benefit." (R.Br. at 45-46.) On the contrary, Lee's statements tie employees' union support for ILA Local 1970 to H&M's refusal to hire them. Lee was in charge of hiring and had this power within his control. *Phillips 66*, 369 NLRB No. 13, slip op. at 3 fn. 7 (2020). As a result, the statements are coercive and therefore violate Section 8(a)(1). *Eastern Essential Services, Inc.*, 363 NLRB No. 176, slip op. at 12 (2016) (statements to applicant coercive because tells them they would not be hired due to union affiliation); *J.D. Landscaping Corp.*, 281 NLRB 9, 11 (1986). Similarly, Lee's statement to Aughtman coercively tells a new employee not to stab Lee in the back with any union activity.

H&M also contends that, by the time Lee had hiring authority, he would have been informed of H&M's standard hiring and implies that because Lee knew what the hiring standards were, he would not need to make such statements.[50] Training does not necessarily translate into correct action. See generally *Overnite Transportation Co.*, 336 NLRB 387, 392 (2001). In these situations, Lee violated Section 8(a)(1) when he told employees that H&M were denied employment in retaliation for their union activities while employed at ITS.

I find each of these statements violate Section 8(a)(1). The Board has the authority to find and remedy a violation even in the absence of a specific allegation when the issue is closely connected to the complaint's issue and has been fully litigated. *SNE Enterprises Inc*., 347 NLRB 472 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007). The initial charge, filed May 13, 2019, alleges that H&M failed and refused to hire a majority of predecessor ITS's employees. Lee's statements are tied to H&M's alleged failure to hire these employees. The first amended charge, filed July 9, 2019, alleges that since late January 2019, H&M's supervisors, including Lee, told employees that they were not hired because of their union activities. Both charges are within the 10(b) period. Even assuming the first statement was made on H&M's first day of operations, the earliest possible date, the 10(b) period ended on July 23, 2019. The complaint specifically alleges the 8(a)(1) violation for Lee's telephone call. H&M had the opportunity to cross-examine each of these witnesses and has denied Lee would have made such statements. H&M has had adequate notice that this issue is closely connected to the allegations within the complaint and the issue was fully litigated.

II. APPLICABLE LAW FOR SUCCESSORSHIP

H&M contends that it is not a successor to ITS at Norfolk Yard. Industrial peace remains the overarching goal of the National Labor Relations Act. *Harter Tomato Products Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir 1998), citing *Brooks v. NLRB*, 348 U.S. 96, 103

[50] H&M relies upon Tr. 1908.

(1954). Maintaining industrial peace remains a goal when an existing bargaining unit is subject to a shift in the employer. The successorship doctrine presents a rebuttable presumption that the new employer must bargain with the union in place with the predecessor if the new employer is a successor in fact to the prior employer and the majority of its employees were employed by the prior employer. *Harter Tomato*, supra, citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39-41 (1987). The determination is based upon the totality of the circumstances. *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009), enfg. 350 NLRB 48 (2007).

A successor contractor is not required to hire all or even any of the employees who the predecessor contractor employed. But the successor contractor cannot refuse "to hire the predecessor's employees because they were represented by a union or to avoid having to recognize or bargain with that union." *Eastern Essential* Services, 363 NLRB No. 176, slip op. at 12 (2016). The factors to consider are whether the successor has substantial continuity of the enterprise and hires a majority of the predecessor's workforce. *NLRB v. Simon DeBartelo Group*, 241 F.3d 207, 210 (2d Cir. 2001), enfg. 325 NLRB 1152 (1998). These factors are viewed from the predecessor employees' perspective, or whether employees who are retained will view the job situation as "unaltered." *Fall River Dyeing*, 482 U.S. at 43, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973) (quotes omitted). The bargaining unit also must be an appropriate unit. If the new employer, or successor, discriminatorily refuses to hire the predecessor's employees and hires employees to avoid its bargaining obligation with the predecessor employees' collective-bargaining representative, the successor and the new union accepting recognition have violated a number of the Act's provisions.

Respondent denies that H&M is a successor because it does not have substantial continuity with the predecessor, particularly with continuity of the workforce and lack of discrimination against hiring predecessor ITS's workforce. Respondent further argues that the functions performed by H&M, versus ITS, were insufficiently alike. Respondent also contends that the ILA Local 170 bargaining unit was inappropriate because it hired a smaller workforce and H&M "legally recognized" Teamsters Local 822. (R. Br. at 46-48.)

III. H&M AND ITS HAD SUBSTANTIAL CONTINUITY AT NORFOLK YARD

H&M contends it did not have sufficient continuity of enterprise to be a successor because it initially contracted only for yard operations and trailer repair, but not lift maintenance and it used its own equipment. (R. Br. at 48-49.) A more detailed examination reveals otherwise. Substantial continuity between two enterprises inquiry is factual and based upon the totality of circumstances. *International Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 779 (D.C. Cir. 1992). The factors considered are:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production processes, produces the same products and basically has the same body of customers.

Shares, Inc. v. NLRB, 433 F.3d 939, 944 (7th Cir. 2006), enfg. 343 NLRB 455 (2004); *Harter Tomato Products*, 133 F.3d at 937, citing *Fall River Dyeing*, 482 U.S. at 43.[51]

[51] See also *Ports America Outer Harbor*, 366 NLRB No. 76, slip op. at 2 (2018) (generally perform

No single factor receives controlling weight. *Pennsylvania Transformer Technology, Inc. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001), enfg. 331 NLRB 1147 (2000). The substantial continuity examination is taken with an emphasis on the employees' perspective and asks if employees would understand that their jobs situations were unaltered. *Pennsylvania Transformer*, supra, citing *Harter Tomato Products*, 133 F.3d at 937-938; *DeBartelo*, 241 F.3d at 210; *Petroleum & Indus. Workers*, 980 F.2d at 779.

H&M and ITS at Norfolk Yard performed intermodal rail operations: taking containers off and on train cars; parking the containers or taking containers to trains; the gate functions; and maintenance. The maintenance function was limited because H&M did not start with the crane maintenance work that ITS performed.

Operations at the Norfolk Yard continued without a break and without a significant change in scale. "[A] change in scale of operation must be extreme before it will alter a finding of successorship." *Mondovi Foods Corp*., 235 NLRB 1080 (1978); *Contract Carrier*, 258 NLRB 353 fn. 2 (1981) (change in the scale of operations not sufficiently extreme, especially when considered in light of the other relevant factors). Like other factors, it is measured from the perspective of the respondent's employees. *Bronx Health Plan*, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999) ("[F]rom the perspective of the Respondent's employees, there was no change in the scale of the operation.").

Operations at the Norfolk Yard were unchanged. The gate clerks, groundsmen, hostler drivers, crane operators and chassis mechanics had no significant changes in their duties. Barrow testified that the work methodology had not changed. This factor, taken from the perspective of the employees and admitted by Barrow, demonstrates H&M had almost all the same production processes and "the same products" as ITS. This small change, omission of crane maintenance and repair, was not so "extreme" that employees would consider this a significant change in the scale of operations when all other employee positions were unchanged. *Contract Carrier*, supra. Therefore, this factor favors a finding that the scale of operations did not undergo a substantial change.

Regarding customers, H&M and ITS had the same and only customer at the Norfolk Yard: Norfolk Southern. This factor supports a finding of substantial continuity and successorship. *American Press, Inc.*, 280 NLRB 937, 937 and n. 3 (1986), enfd. 833 F.2d 621 (6th Cir. 1987). The same supervisors, Lee and Barrow, remained for the daily operations, which also favors substantial continuity. *Everport*; supra; *Simon DeBartelo Group a/w M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998), enfd. 241 F.3d 207 (2d Cir. 2001).

The only difference was that, as of January 23, 2019, H&M did not have the contract for the crane maintenance, which it obtained by June 2019. Hunter, the mechanic already hired by H&M by the time H&M obtained the work, was demonstrably qualified to resume the crane maintenance duties.

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same tasks, under generally same working conditions and under most of predecessor's supervisors), enf. denied on other grounds 971 F.3d 356, reh'g en banc denied (D.C. Cir. 2020).

The operations also were unchanged with the type of equipment used. The cranes and chassis remained the property of Norfolk Southern and did not change. Although H&M brought trucks from Chicago and New Jersey, H&M provides no evidence of any change in how the equipment was operated or job classifications that operated the trucks.

Ultimately, the testimonies of Barrow and the former ITS employees who were hired by H&M demonstrate that they viewed the jobs as unchanged. The totality of circumstances shows substantial continuity between H&M and ITS. *Harter Tomato,* supra.

IV. THE ISSUE OF HIRING A SUBSTANTIAL AND REPRESENTATIVE COMPLEMENT

Having found substantial continuity, the next inquiry is whether H&M hired a substantial and representative complement. Substantial and representative complement considers whether the job classifications were filled or substantially filled and whether the operation was in normal or substantially normal production. Two issues are encompassed here: first, did H&M fail to hire ITS employees for reasons that violate Section 8(a)(3), through *Love's Barbeque*, 245 NLRB 78 (1979)[52] enfd. in rel. part 640 F.2d 1094 (9th Cir. 1981); and secondly, did H&M recognize a unit of temporary employees in violation of Section 8(a)(2).

"In general, if a new employer continues operations uninterrupted, the proper substantial and representative complement determination should take place at the time of transfer of control." *Shares, Inc. v. NLRB,* 433 F.3d at 945, citing: *Fall River Dyeing*, 492 U.S. at 48-49; *3750 Orange Place Ltd. Partnership v. NLRB*, 333 NLRB F.3d 646, 663 (6th 2003); and, *Prime Services, Inc. v. NLRB*, 266 F.3d 1234, 1239-1240 (D.C. Cir. 2001). But for H&M's discriminatory refusal to consider for employment most of the workforce at ITS, a majority would have survived H&M's takeover from ITS. As in *Everport Terminal Services, Inc.*, 370 NLRB No. 28 n. 4 (2000), Respondent failed to hire most of the bargaining unit employed by the predecessor.

A. Alleged Discriminatory Hiring under Section 8(a)(3)

1. Applicable law

A respondent successor employer has an obligation to bargain with the predecessor employees' exclusive bargaining representative when the successor hires a majority of employees employed by the predecessor. *Pennsylvania Transformer*, 254 F.3d at 223. Normally a successor has no obligation to hire the predecessor's employees, but in doing so, its hiring practice may not discriminate against union employees. *Adams & Associates Inc. v. NLRB*, 871 F.3d 358, 369-370 (5th Cir. 2017), citing *Fall River Dyeing*, 482 U.S. at 401; *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1005 (D.C. Cir. 1998), enfg. in rel. part 322 NLRB 801 (1996).

Change in bargaining unit size alone does not destroy "otherwise substantial continuity between old and new employees." *DeBartelo*, supra, at 212. The factors usually examined here are whether job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal products and issues related to expansion with a larger workforce. Id. at 223.

[52] *Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62*.

When the employer is faced with two rival unions, the employer should remain neutral. *Ralco Sewing Industries, Inc.*, 243 NLRB 438, 442 (1979). If the predecessor's employees' union activity, including union affiliation, is a substantial or motivating factor for the successor's refusal to hire, it may violate Section 8(a)(3) of the Act, unless the successor can prove, by a preponderance of the evidence, that its actions would have been no different and for "wholly permissible reasons." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983); *Adams & Associations, Inc. v. NLRB*, 871 F.3d 358, 369-370 (5th Cir. 2017), enfg. 363 NLRB No. 193 (2016). However, if the successor's reasons are pretextual, the successor commits an unfair labor practice. *Transportation Management Corp.*, 462 U.S. at 398.

In such a situation, the successor employer's alleged failure to hire predecessor employees in order to avoid a bargaining obligation is examined through the traditional burden-shifting test in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Downtown Hartford YMCA*, 349 NLRB 960 (2007); W*&M Properties of Connecticut*, 348 NLRB 162, 163 (2006). General Counsel has the burden of showing that the successor employer failed to hire the predecessor's employees and did so due to antiunion animus. Id. The General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020); *Wright Line*, 251 NLRB at 1089.

The burden then shifts to the successor employer to show it would not have hired the predecessor's employees even in the absence of its unlawful motive. *Adams & Associates*, 871 F.3d at 370. To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, supra.; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

2. Assessment per *Love's Barbeque*

a. Employees' protected activities and knowledge

Protected activity, which is representation by ILA Local 1970, and knowledge are established. *Yonkers Associates, 94 L.P.*, 319 NLRB 108, 111 (1995). The ITS employees engaged in a successful campaign for representation with ILA Local 1970. They participated in a number of meetings during their pre-election efforts.

Lee demonstrated knowledge of the ITS employees' union activities on behalf of ILA, both before and after H&M came to operate the intermodal operations at Norfolk Yard. He repeatedly castigated employees before and after the election about their union activities and sympathies. He also made repeated inquiries, before and after the election, about their union activities and why they did not inform him about it. He attended the election meetings and knew that Carlos Jones was the observer for the union, as

demonstrated by his statements about wanting to shoot Jones if he had a gun. He knew the employees lopsidedly selected ILA as their bargaining agent. He then identified union activities as a reason he did not hire at least 2 predecessor employees.

As noted above, Barrow's assumption that DeGroot was the hiring manager was not demonstrated for the other employees. (Tr. 1799.) Barrow admittedly was not involved in hiring until after Lee's death and his promotion to terminal manager. DeGroot only stayed at Norfolk Yard for 2 weeks and he admittedly left selection of candidates for interview to Lee.

DeGroot admitted that he relied upon Lee to identify his "key employees." Lee apparently had determined to hire Barrow, Williams, Young, and Wade before DeGroot was present at the Norfolk Yard. Even on January 22, when Lee knew he would be working for H&M, he impliedly told Clarke she would not be hired despite texting her to complete an application. Even if I credited DeGroot with lack of knowledge, DeGroot admittedly delegated reviewing the applications and selecting candidates for interviews to Lee. As a result, Lee's knowledge is imputed to "higher level" management for the initial hiring. *Flex-N-Gate Texas, LLC*, 358 NLRB 622 n. 1 (2012).

Respondent does not dispute the union activities of the ITS employees, but it argues that DeGroot had no knowledge of the former ITS employees' union activities. I do not credit denials and memory failures from Connors and DeGroot here. In the Credibility section, Connors' answers indicate a strong avoidance to admit what he knew. On the other hand, Page testified that DeGroot or his terminal manager was already aware that ILA organized the Norfolk Yard unit. Thus, activity and knowledge are established.

b. Animus

Animus need not be the sole motivating factor for an employer's refusal to hire, but it must be a substantial or motivating factor in the employer's adverse action. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 401 (1983). Motive is a matter of facts, which may be found in direct and indirect evidence. *Adams & Associates, Inc.*, 871 F.3d at 370. For assessing animus, the factors to consider include:

> [S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Everport, supra, quoting *Yonkers Associates, 94 L.P.*, 319 NLRB 108, 111 (1995).

i. Substantial evidence of animus

Lee's statements while working as the terminal manager for H&M demonstrate that Lee did not leave that animus behind with predecessor ITS. Lee held significant animus towards a number of the ITS employees and did not hire 11 of them when H&M had positions available. This animus is corroborated by Aughtman's testimony and Lee's

admission against interest that the ITS employees who brought in ILA Local 1970 at ITS were not hired.

Evidence occurring before the 6-month statute of limitations may be considered as background to shed light on a respondent's motivation within the 10(b) period. *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 16 (2019), citing *Grimmway Farms*, 314 NLRB 73, 74 (1994), enf. in part 85 F.3d 637 (9th Cir. 1996). The evidence before the 10(b) period include Lee's verbal statements and attacks plus the text message to McManus in October 2018. Here, Lee's statements demonstrate a pattern of Lee's animus. Respondent proposes that Lee's animus was non-existent; after all, Lee is not here to defend himself. However, presuming that Lee would have denied all these statements to which employees testified, the credited evidence demonstrates Lee, while employed by ITS, developed significant animus towards union activity and was not shy about verbalizing it. He would have had a hard time denying the text message. Although Respondent is correct that H&M cannot be liable for Lee's conduct at ITS, the credited statements show a pattern of Lee's attacks that developed and continued when he went to work for H&M.

In the ITS days, Lee knew about the ITS employees' union activities and specifically stated to a number of employees that he knew they attended union meetings. He was angry about the unionization, including making threats, implying surveillance, and predicting future employment prospects. He was angry and began cursing directly at the employees instead of generally. See generally *Hialeah Hospital*, 343 NLRB 391, 391-392. These statements show Lee carried animus before H&M was present. Lee's statements were not limited to his state of mind or his personal preference: He made statements about hiring based upon his anger against those employees who went union "behind his back." See *Adams & Associates, Inc.*, 871 F.3d at 371. Such statements demonstrate Lee's belief that a majority of the ITS employees were disloyal. *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 1 and n. 5 (2018), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019) (respondent employer violated Sec. 8(a)(1) by calling employees backstabbers for equating protected activities with disloyalty). See *Print Fulfillment Services*, 361 NLRB 1243, 1243-44 (2014) (expression of "disappointment" was coercive because a reasonable employee would fear that his supervisor's stated "disappointment" could manifest itself in subsequent reprisals); *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132 (2000) (manager unlawfully questioned employee's loyalty and told her that he was "highly disappointed" in her for not telling him about her union sympathies).

More specifically, Lee said that employees would lose their jobs if the employees voted in favor of unionization. Lee also interrogated the ITS employees individually about their union sympathies and impliedly asked about their activities when he asked why employees did not tell him about the union activities. The factors examined for interrogation are set forth in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985):

> "[E]mployer's background (i.e., whether there is a history of union hostility or discrimination), the nature of the information sought (i.e., whether the interrogator appeared to be seeking information on which to base taking action against individual employees), the identity of the questioner (i.e., whether he or she held a high position in the company hierarchy), the place and method of interrogation (i.e., whether the employee was called from work to the interrogator's office, and whether

> there was an atmosphere of unnatural formality), and the truthfulness of the employee's reply."

Healthy Minds, Inc., 371 NLRB No. 6, slip op. at 4 (2021), quoting *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. at 1-2 (2019), enf. denied on other grounds 998 F.3d 9978 (D.C. Cir. 2021). Also see *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These factors should not be applied mechanically. Lee's statements included negative connotations about employment and threats to shoot Carlos Jones in the head, plus inviting McManus to fight. The employees did not necessarily answer Lee truthfully about what they knew or when they knew. As noted in *Sea Breeze*, 331 NLRB at 1132 (internal quotes and citations omitted), interrogations, such as Lee's are coercive because "employees fear [. . .] discrimination on the basis of the information that has been obtained[.]" At the time, some employees, such as Jones, did not publicly tell Lee about his activity and Lee asked him questions about the situation.

Lee's animus while employed at ITS is also demonstrated in his text messages to McManus. At hearing, Respondent claimed that General Counsel did not provide sufficient authentication for admission of the text message; in the alternative, the texts were hearsay and the texts were more prejudicial than probative. I take up these issues consecutively.

General Counsel properly authenticated the text messages. Writings or other data transmitted electronically through cell phones are considered text messages. Hearsay Objections to Admission of Text Messages or Testimony Thereof, 10 ALR 7th Art. 4 (2016). To authenticate, the proponent shows sufficient evidence to demonstrate that the item in question is what the proponent says it is. Fed. R. Evid. 901(a). Authentication may be accomplished in a number of ways, including: a witness with knowledge of the item, Fed. R. Evid. 901(b)(2); distinctive characteristics, Fed. R. Evid. 901(b)(4); or, for a telephone conversation, information that shows the call was made to a number assigned at the time to a person or to a particular business, Fed. R. Evid. 901(b)(6). More specifically:

> [A]uthentication of text messages has two components. First, a witness with personal knowledge must testify that printouts of text messages accurately reflect the content of the messages. Second, a witness with personal knowledge must provide testimony establishing the identity of the purported sender of the text messages. Identity may be established through a combination of at least two of the following: (1) the phone number was assigned to or associated with the purported sender; (2) the substance of the text messages was recognizable as being from the purported sender; (3) the purported sender "responded to an exchange in such a way as to indicate circumstantially that he or she was in fact the author of the communication"; or (4) any other corroborative evidence under the circumstances.

Authentication of Text Messages, 38 A.L.R.7th Art. 2 (originally published in 2018).

Text messages and emails, like most documents, are authenticated when a witness with personal knowledge testifies that, *inter alia*, he signed it, used it, or saw others do it. *Randazza v. Cox*, 94 Fed. R. Evid. Serv. 194 (D. Nev. 2014), citing *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 at fn. 8 (9th Cir. 2002). Although the best method

is direct evidence, circumstantial evidence may be relied upon to establish authenticity. *Randazza*, supra.

Unlike *Randazza*, supra, the text message here has no break in the custody link. McManus testified concisely that the text message was sent directly to him from Anthony Lee and was a true and correct screenshot of the text message. He said the cell phone receiving the message belonged to him and the phone number and name identified the sender. This information more than sufficiently authenticates the text messages. *Rubin ex rel. NLRB v. Vista del Sol Health Services, Inc*., 80 F.Supp.3d 1058, 1091-1092 (C.D. Cal. 2015).

Respondent H&M also argued that the texted statements were hearsay. The statements Lee made in the text about getting fired and the like are not submitted for truth of the matter, but instead for Lee's state of mind towards unionization. *Terraprise Holdings, Inc. d/b/a Global Recruiters of Winfield*, 363 NLRB No. 68, slip op. at 6 n. 10 (2015).

Respondent H&M also argued that the text messages were more prejudicial than probative. Relevant evidence may be excluded when "its probative value is substantially outweighed by a danger of . . . confusing the issues, . . . , undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The 1972 Advisory Committee Notes to this rule defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." The text remains probative to Manager Lee's knowledge and animus towards unionization. See: Fed. R. Evid. 803(3), regarding hearsay exception for then-existing mental, emotional or physical condition; *Tri-State Building Trades Council (Backman Sheet Metal)*, 272 NLRB 8, 12 fn. 12 (1984), affd. sub nom *International Broth. Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 105, AFL-CIO v. NLRB*, 781 F.2d 569 (6th Cir. 1986). Respondent does not demonstrate how the text message confused any issue, created an undue delay, wasted time or was cumulative. I find that the text messages Lee sent to McManus show a developing pattern of animus.

Evidence within the 10(b) period is what is relied upon to demonstrate animus for which H&M is accountable. Even without relying upon the animus Lee developed while he worked for ITS, Lee's independent 8(a)(1) statements, above, shows Lee carried his grudge against the employees who unionized at ITS to his management position at H&M. *Grimmway Farms*, 314 NLRB. at 75; *Weco Cleaning Specialists, Inc*., 308 NLRB 310 (1992). These statements are contemporaneous to H&M's actions regarding interviewing and hiring employees, or in the case of several former ITS employees, failure to interview and hire. *Compare Marlan Lewis Designs, Div. of Marian Lewis, Inc.*, 270 NLRB 432 (1984) (where no contemporaneous evidence of statements evidencing animus, no prima facie case).

Similar to the circumstances here, the supervisor in *Weco* who refused to hire the predecessor's employees was deceased at the time of the hearing. As successor H&M's supervisor, Lee unlawfully verbalized that Lucas and Spencer would not be hired because of his union activities at predecessor ITS. See generally *Capital Cleaning Contractors, Inc.*, 147 F.3d at 1008-1009 (statement that successor employer not hiring predecessor's union members actively discouraged employees for applying for positions with successor). He also implied to Clarke that she was working for the union and therefore would not be hired.

Lee's intent not to hire many of predecessor's employees is additionally corroborated: Lee not only told Aughtman that the predecessor's employees were not hired because of their union activities; when Aughtman talked to Lee about applying, Lee previously told him that some people were being terminated and not to come to the terminal until Lee contacted him. Such statements are "substantial evidence of antiunion animus." *Eastern Essential Services, Inc*., 363 NLRB No. 176, slip op. at 1 n. 2 (2016). These statements alone are "independently sufficient to demonstrate unlawful discrimination." *Tito Contractors, Inc*., 366 NLRB No. 47, slip op. at 4 (2018), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019) (respondent employer's statements and actions reveal true reasons). Lee's statements to former ITS employees and Aughtman show a direct link to the former ITS employee's union activities and failure to hire at H&M. See *Tschiggfire Properties*, supra.

An employer is required, in the face of competing unions, to remain neutral. Connors also testified that he would have recognized Teamsters regardless of ILA Local 1970's presence, which is not an indication of neutrality. Page's testimony also shows that DeGroot or Page's terminal manager heard the ILA was giving some trouble at Norfolk Yard. This information also shows animus towards ILA Local 1970 and the employees supporting it.

ii. Lack of a convincing rationale for refusal to hire predecessor's employees and inconsistent hiring practices

Respondent, relying on DeGroot's testimony, contends its hiring practices were non-discriminatory because DeGroot instructed Lee to look for good attitude, good attendance record, and willingness to learn. (R. Br. at 36-37.) The record reflects that H&M had inconsistent hiring practices, which also provides lack of convincing rationale for its failure to consider and/or hire 11 ITS employees in January 2019.

Regarding hiring practices, H&M was required to consider all applicants for employment by the same standards. *DAKA, Inc.*, 310 NLRB at 207. Failure to do so reflects an unequal application of its standards. *Laro Maintenance Corp.,* 312 NLRB at 151. Advancing "spurious reasons" for not meeting with or interviewing predecessor's work force supports an inference of unlawful motive. *Waterbury Hotel Management*, 333 NLRB at 550 (2001), citing *Precision Industries*, 320 NLRB 661, 661 fn. 5 (1996).

H&M was within its rights to require employment applications from the ITS employees. *Packing House and Indus. Services, Inc. v. NLRB*, 590 F.2d 688, 695-696 (8th Cir. 1989), enfg. in rel. part *Mason City Dressed Beef,* 231 NLRB 735 (1977). However, H&M was inconsistent about requiring all ITS employees to complete their applications before they were hired. For example, it did not require an application from Young before he was hired. On January 22, Lee told Young he would be hired. Young was at work on the morning of January 23 when H&M began its operations. Young credibly testified that DeGroot did not interview him. This testimony is further supported because Lee obtained Connors' approval, not DeGroot's, for the hire. *Packing House*, 590 F.2d at 695-696. Similarly, Wade was also told to return the next morning before any interviews took place.

Respondent contends that DeGroot had the authority to hire and intimates that Lee had little involvement at the beginning. However, DeGroot also admitted that he left the

determination on who would be interviewed to Lee. He had no specific recollection of reviewing the applications of the former ITS employees. DeGroot, who maintained involvement at every step of the process at the beginning, did not interview Aughtman; Lee conducted the interview, per Aughtman's credited testimony.

Another shift in H&M's position was whether H&M actually preferred employees without experience. By DeGroot's admission, his hiring plans were to prefer anyone without previous industry experience so that bad habits would not have to be unlearned. However, the evidence shows that 3 of the earliest outside hires, including Aughtman and Costello, had industry experience. DeGroot then excused this change as examining individuals on a case-by-case basis. Although H&M argues that Aughtman and Costello were known as friends or from relatives, DeGroot did not cite reasons that the 2 hires were known individuals because of their relationships with Lee or Connors. Nor did Connors testify to such facts. Therefore, DeGroot's testimony compared to H&M's brief creates an unsupported argument and an after-the-fact shift. *Scientific Ecology Group, Inc.*, 317 NLRB 1259, 1259 (1995). Also see *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 547 (6th Cir. 1991), enfg. 297 NLRB 711 (1990) (inconsistencies in proffered reason and employer's actions lead to inference of an unlawful motive).

Within the first few weeks, H&M hired a few employees who were inexperienced. *Weco Cleaning Specialists*, 308 NLRB at 311. Under Barrow's leadership as terminal manager after Lee's demise, H&M found several of the former ITS employees to be acceptable with their previous experience and hired them. However, on day 1 with H&M, Lee apparently did not select the majority of former ITS employees for interview and apparently did not discuss the former ITS employees' applications with DeGroot. H&M's reasons for not even interviewing the former ITS employees are spurious.

H&M also relies upon Barrow's rationale for not hiring the 11 former ITS employees. First, Barrow was not involved at all with hiring until after Lee's death. Nothing shows that DeGroot or Lee relied upon these reasons Barrow espoused. Secondly, Barrow admitted that some were acceptable candidates; however, he has not hired them or made any attempt to contact them. For example, he had no first-hand knowledge that McManus was earning too much money to consider employment.

Another criteria that was not applied equally in the initial H&M hiring were attitude and morale. The term "attitude" is often a code for union activity. See, e.g., *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 21 (2021); *SPM Communications, Inc. Hoover's Audio Visual*, 291 NLRB 1177, 1181-1182 (1988) (employer's statement that if discriminatee's attitude changed, he would be acceptable for hire was more likely due to union contacts). DeGroot, who H&M claimed was in charge of hiring, admitted he knew naught about the employees who worked for ITS. He claimed he checked those factors that supposedly make Lee a successful manager while at ITS but waffled when questioned if Lee performed his duties in the proverbial vacuum, without the support and work of the ITS employees. DeGroot shifted about hiring inexperienced employees, then admitted he approved hires at the Norfolk Yard for new employees with experience in the industry. He also admitted that he relied upon Lee to identify key employees and that Lee was involved in every aspect of hiring. Costello testified that his interview with DeGroot was no more than a few minutes and at its conclusion, DeGroot said he was hired; it is difficult to believe that one can assess attitude and effect on morale with a short interview and without a background check.

H&M hired key employees who had known issues. Among the key employees Lee identified was Young. Yet Young, known to be a problem with the outside truckers, was considered a valuable asset and hired. Young was told he was hired the day before H&M began operations. Young was working even before his application was completed and apparently before he met DeGroot. Norfolk Southern later banned him from the property, which effectively terminated his employment with H&M. Wade, who caused damage to a crane in 2017, was hired. These two hires demonstrate disparate treatment.

iii. Evidence showing H&M conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority to avoid application of the Board's successorship doctrine.

Much of the staffing issues are discussed above and in the section below on pretext. Circumstances demonstrate that H&M's hiring practices were based on unlawful intent. First, H&M failed to hire a "disproportionate" number of union supporters who were employed by ITS and instead hired a large number of non-ITS personnel. This failure is considered "persuasive evidence of discrimination." *Meyers Transport of New York*, 339 NLRB 958, 972 (2003).

Lee had advised a number of the former ITS employees to come back at 9:00 a.m. to complete their applications. By 12:00 noon on the same day, H&M recognized Teamsters Local 822. Lee advised a number of the former ITS employees to clear out their belongings and clean out their lockers, which implies that these applicants were not under consideration. Collins, on the other hand, started to clear out his tools on January 23, 2019 and then immediately began to unload them before he left the property. Collins was immediately hired. In conjunction with the other evidence, it is telling that Lee had no intention of hiring, much less interviewing the 11 former ITS employees. This conclusion is buttressed by Lee's statement to Aughtman that he intended not to hire a number of persons and not to come back to the facility until Lee said to do so.

c. Conclusion on animus

Animus towards predecessor's employees' union activities and sympathies is shown overwhelmingly through direct evidence. DeGroot admitted that, from the beginning, Lee "was involved in every step of hiring . . . ." (Tr. 1981.) He further admitted that he left the responsibility of selecting candidates for interview to Lee. Lee's independent 8(a)(1) statements, above, shows Lee carried his grudges to his management position at H&M and based upon his animus, admitted he had no intent of hiring those he thought stabbed him in the back. *Grimmway Farms*, 314 NLRB at 75; *Weco Cleaning Specialists, Inc.*, 308 NLRB 310 (1992).

H&M maintained that Lee's conduct and statements while employed by ITS are not binding upon H&M because H&M is not a successor. Further, H&M maintains it is wrong to rely upon conduct that decedent Lee cannot refute and opposing parties submitted to taint the record. (e.g., R. Br. at 1 and 45 n. 5.) The record does not support a finding that the evidence presented by General Counsel or the ILA regarding the decedent's conduct is prejudicial. The evidentiary rules provide sufficient guidance when the statement of the decedent can be used. Nor do I rely solely upon General Counsel's witnesses to determine Lee's responsibilities at H&M. The credited evidence demonstrates that Lee exhibited a pattern of hostility towards the former ITS employees'

union activities that was reflected from the beginning of his employment with H&M and beyond. H&M is held responsible only for Lee's actions while he is employed by H&M.

Similar to the circumstances here, the supervisor in *Weco* who refused to hire the predecessor's employees was deceased at the time of the hearing. As successor H&M's supervisor, Lee unlawfully told that Lucas and others they would not be hired because of their union activities. These statements alone are "independently sufficient to demonstrate unlawful discrimination." *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 4 (2018), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019) (respondent employer's statements and actions reveal true reasons); *Weco Cleaning Specialists*, 308 NLRB at 310. Not only did Lee tell former ITS employees they were not hired because of their union activities, he also verbalized the same reasons to Aughtman. These statements are "substantial evidence of antiunion animus." *Eastern Essential Services, Inc.*, 363 NLRB No. 176, slip op. at 1 n. 2 (2016).

The direct and indirect evidence supports a finding that animus towards the union activities and sympathies of the 11 former ITS employees. Much of that evidence also points to pretext.

3. Pretext

Pretext may be inferred when a respondent provides false reasons for its actions in hiring practices. See generally *Waterbury*, 333 NLRB at 550, citing *Love's Barbeque*, 245 NLRB 78, 80 (1979). A finding of pretext is significant because it implies that the employer intended to hide an unlawful motive. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230, reh'g en banc denied (D.C. Cir. 1995), enfg. 312 NLRB 155 (1993). Pretext also means that the employer's presented reasons did not exist or were not actually relied upon, which leaves intact the inference of wrongful motive. *Roemer Industries*, 367 NLRB No. 133, slip op. at 17 (2019), enfd. 824 Fed.Appx. 396 (6th Cir. 2020); *Champion Rivet Co.*, 314 NLRB 1097, 1098 (1994).

In *W&M Properties*, 348 NLRB at 163, the Board agreed that the respondent employer's reasons for failing to hire predecessor's employees were pretextual and failed to rebut General Counsel's prima facie case. There respondent employer did not hire its predecessor's unionized employees because anyone hired would have to be nonunion or they would not be hired at all. The respondent employer did as it stated. Id. Some of the reasons given by respondent was the condition of the facility when taking over. The respondent employer claimed it wanted to keep as many of the predecessor employees to make a smooth transition. It had a number of factors it examined, such as experience, training, licenses, "eager and interested individuals," and "no disciplinary issues or timeliness problems." Id. at 169. As H&M determined not to hire 11 former ITS employees, it "wield[ed] an undiscerning axe, and antiunion employees suffer along with their pro-union counterparts." See generally *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991).

As discussed above H&M provided shifting reasons for its hiring standards and practices. Shifting reasons provide "strong evidence" of pretext when that reason is not asserted at the time of a respondent's actions. See generally *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 16 (2021), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). The reason for hiring inexperienced employees is pretextual "when it is overcome by evidence that an anti-union motive influenced the decision to

exclude experienced workers." *Laro Maintenance Corp.*, 56 F.3d at 230-231. When he became terminal manager, Barrow began to hire several former ITS employees, who had significant experience with the prior contractors at Norfolk Yard. H&M provides no reason why these employees were acceptable after Lee's death and only a few months it began operations at the Norfolk Yard. This shift in position on the acceptability of a few former ITS employees supports pretext and animus. *Corbel Installations, Inc.*, 360 NLRB 10, 30 (2013).

H&M cites that DeGroot's testimony that he would not hire additional former ITS employees beyond the key employees and would hire off the street as was his practice. (R. Br. at 46, citing Tr. 2006, 2016; R. Br. at 39, citing Tr. 2009.) At the same time, he testifies that he left review of all applications to Lee. Even if I credited this testimony, DeGroot shifted on whether he and/or Lee reviewed the applications from ITS employees. Based upon H&M's argument, DeGroot's testimony, that the ITS employees' applications were reviewed, demonstrates a useless exercise because Lee already determined that none would be hired. This shifting rationale smacks of pretext.

H&M contends that it had other legitimate non-discriminatory reasons for not hiring the former ITS employees. No one disputes the importance of serving Norfolk Southern's needs to keep the trains moving on time. Respondent H&M relies upon Barrow's testimony for reasons that a number of employees were not hired based upon Barrow's testimony about why he wouldn't have hired them. (R. Br. at 42-43). This rationale is problematic because Barrow admittedly was not involved with H&M's initial hiring at Norfolk Yard. Therefore, Barrow's reasons for not hiring did not play into H&M's reasons when the predecessor employees made their applications on January 23, 2019: H&M instead relies upon after the fact justifications. These reasons do not support a legitimate business rationale and therefore are pretextual. See generally *Pennsylvania Electric Co.*, 289 NLRB 1200, 1211 (1988) (advancing demonstrably false reasons for failure to hire temporaries was pretextual).

In the vein of keeping Norfolk Southern happy, H&M, via Lee's selection as a key person, hired Young when he was known to have problems with the outside drivers picking up and delivering containers. Nonetheless, this problem continued, causing Norfolk Southern to eventually ban Young from the railroad's property and effectively forcing H&M to make him resign. This factor also supports pretext.

Respondent H&M contends that its preference for less experienced employees was not unlawful because they are easier to train. For that proposition, H&M cites *Hartman Bros. Heating & Air-Conditioning*, 332 NLRB 1343, 1344 n. 9 (2000), enfd. 280 F.3d 1110 (7th Cir. 2002). *Hartman* is a salting case in which the Board affirmed the administrative law judge's determination that one applicant with 26 years of appropriate experience was likely paid a prevailing wage greater than $8.00 per hour. 332 NLRB at 1344 n. 9. The judge decided that the main reason the applicant did not receive a job interview was that he was overqualified. 332 NLRB at 1348.[53] However, in the present

[53] H&M cites additional cases supporting its contention that it does not have to hire overqualified applicants: *Tambe Electric, Inc.*, 346 NLRB 380, 382 (2006) (refusal to consider salting case) and the cases cited therein. They too are inapplicable because DeGroot did not base these hiring decisions on overqualification. Further in *Tambe*, the employer maintained a lawful preference for former employees or those recommended by "current employees, family members or business acquaintances." Id. at 382. H&M does not rely upon such reasons either.

case, H&M claimed the individuals would be easier to train if they had no industry experience whatsoever, but then hired two individuals with just that sort of experience. It never claimed overqualification or likely a demand for higher pay, as were the ultimate determinations in *Hartman*, and then DeGroot excused it on a case-by-case basis. In comparison, H&M's position on avoiding those who are overqualified is questionable because it hired Hunter in early February 2019. Hunter was imminently qualified to perform work on cranes in addition to trucks but did no chassis work: In one aspect, Hunter was overqualified at a time when H&M had no contract with Norfolk Southern to perform crane work; in another aspect, Hunter was not qualified for chassis work. Nothing in the record indicates that, in early February 2019, when Hunter was hired, that H&M could have anticipated that about 4 months later, June 1, 2019, it would receive the contract for crane maintenance from Norfolk Southern. H&M's reasoning is pretextual.

DeGroot contended that he also wanted demonstrable positive attitudes. Again, he relied upon Lee's clouded judgment to make that determination. Further, DeGroot could not recall any of the applicants: His testimony about neutral hiring criteria not credited. H&M's reason on this point is pretextual. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 5-7 (2016), enfd. 871 F.3d 358, 371-372 (5th Cir. 2017).

In addition, H&M had a high rate of turnover with the inexperienced employees through failures of background checks, drug tests or finding that the quality of work was not meeting their needs. *Adair Express, LLC*, 335 NLRB 1224,1229 (2001). The hiring of the inexperienced employees is pretextual and ensured H&M would not have to bargain with ILA Local 1970. Id.

The evidence, as discussed below, also shows H&M sought out representation by Teamsters for the Norfolk Yard. I have found that Connors and DeGroot knew about the ILA's presence at Norfolk Yard; regardless of this knowledge, Connors and DeGroot worked to obtain recognition of Teamsters Local 822. H&M's favorable treatment of Teamsters Local 822 also points to pretext. *Everport*, supra.

H&M's legitimate business defense fails because many of its reasons are pretextual. When the reasons taken for an action are false, the inference that H&M had unlawful reasons for its actions remains. *Airway Maintenance, Inc. d/b/a AMI, Inc*., 319 NLRB 536 (1995), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1968).

4. Conclusion regarding *Love's BBQ*

I therefore conclude that Respondent H&M refused to hire most of the ITS employees for retaliation towards their union activities. *Weco Cleaning Specialists*, 308 NLRB at 311.[54] The union activities of those not hired are well documented. Lee's

[54] The *Wright Line* analysis is made necessary due to H&M's affirmative defense that it has a legitimate business defense for not hiring predecessor's employees, so that the case is based upon mixed motive. These facts could be examined pursuant to *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). The test is: whether the discharged employee was at the time engaged in a protected activity; that the employer knew it was protected activity, that the basis of the discharge was an alleged act of misconduct in the course of that activity; and the employee was not, in fact, guilty of that misconduct. If the employer can show it had a good faith belief that the misconduct did occur, the burden shifts back to the General Counsel to prove that the misconduct did not

knowledge is well-documented and is imputed to his new employer. Further, Page's testimony demonstrates that DeGroot likely knew of the union activities at Norfolk Yard.

General Counsel amply proved animus. DeGroot admitted he left Lee in charge of reviewing the applications and determining who to interview. Lee, who held animus, was the fox watching the henhouse in reviewing applications and selecting employees for interview. Lee's animus continued after H&M hired him. Directly or implicitly, he told a few of the former ITS employees he was not hiring them because of their union activities and independently violated Section 8(a)(1). He also told Aughtman, a new hire, he was not hiring the former ITS employees because of their union activities with ILA. DeGroot's rationales on how to hire were undermined by the actions, such as claiming the desire to hire employees without experience in the industry and then doing the opposite with 2 newly hired employees, then Barrow hiring experienced ITS employees

Some of the same reasons support finding that H&M's reasons for not hiring the alleged discriminatees are pretextual. Respondent presents no credible reasons why, on January 23, 2019, a majority of predecessor's employees could not have filled H&M's open positions. *Airway Maintenance*, 319 NLRB at 536. Because its reasons are pretextual, H&M does not demonstrate it would have taken the same actions and its *Wright Line* defenses fail. *Adams & Associates*, supra, slip op. at 6.

But for H&M's unlawful hiring scheme, the prior ITS employees would have comprised a majority of H&M's workforce. *Smith and Johnson Construction Co.*, 324 NLRB 970 (1997). More than a few employees suffered discrimination, in violation of Section 8(a)(3) of the Act. With the finding below that the historic bargaining unit remained appropriate, H&M was the successor to ITS and lost the right to set initial terms and conditions of employment, in violation of Section 8(a)(5). *Everport Terminal Services, Inc.*, 370 NLRB No. 28, slip op at 1 n. 4 (2020).

B. H&M Unlawfully Recognized Teamsters Local 822 and Did Not Have a "Substantial and Representative Complement"

H&M maintains that its cadre of traveling employees were employees of Norfolk Yard at the time of signing the cards. It further contends it recognized as majority and the current complement of employees are a substantial and representative of unit workforce to be employed in future. It also contends that its agreement with Teamsters Local 710 required it to notify that local when it obtained a new location However, the record demonstrates that the agreement with Teamsters Local 710 did not require such notification and the traveling H&M employees were assigned to Norfolk Yard only temporarily. Finding that H&M recognized a unit of temporary employees and subsequently signed an agreement with that union, I also find that H&M violated Section 8(a)(2) and (1) of the Act.

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occur. *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1133-1134 (D.C. Cir. 2003), citing *Burnup & Sims*, supra. As above, the employees engaged in the protected activity of organizing. Lee was aware of the organizing and the election results. Lee specifically stated that he would not hire predecessor's employees because of their union activities. Lee's statements show he strongly believed that the employees were guilty of misconduct because they organized with ILA, although nothing in the record supports a finding that the ITS employees' were engaged in misconduct because they organized with ILA Local 1970.

1. Applicable law

Section 8(a)(2) of the Act states that an employer commits an unfair labor practice when it acts:

> To dominate or interfere with the formation or administration of any labor organization or contribute financial or other supporter to it: Provided, That subject to rules and regulations made and published by the board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . .

Section 8(a)(2) prohibits an employer from contribution support to a labor organization, which can take the form of giving a union recognition when it is not the majority representative. An employer's recognition of a minority union and/or premature recognition of a union are unlawful because "the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" See generally *International Ladies Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 738 (1961) ("*Bernhard-Altmann*"), citing *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938). An employer violates Section 8(a)(1) and (2) of the Act by recognizing a union that does not represent a majority of the employees in an appropriate bargaining unit. See I*nternational Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-38 (1961).

The Board applies a "totality of the circumstances" standard to reviewing potential Section 8(a)(2) violations. *Dr. Pepper Snapple Group*, 357 NLRB 1804, 1813 (2011) (cites omitted). Neither scienter nor good faith is an element required to prove these violations. *Bernhardt-Altmann*, 336 U.S.at 737-738. To allow such a defense impermissibly undermines the Act's promise to permit "employees freedom of choice and majority rule in employee selection of representatives." Id. at 738-739. The Board examines events that occur both before and after recognition to make such a determination. *Dairyland USA Corp*., 347 NLRB 310, 311-312 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008).

I first examine whether the clause in the Teamsters Local 710 collective-bargaining agreement required H&M to recognize a unit organized by Teamsters Local 710. If the clause does not apply, then H&M unlawfully relied upon it to recognize Teamsters Local 822. Secondly, I examine whether H&M recognized a unit of temporary employees. I then examine whether H&M provided unlawful assistance to Teamsters Local 822 through the card process. For the reasons provided in the following section, H&M could not assist or recognize a bargaining unit with Teamsters Local 822 for Norfolk Yard.

2. H&M's reliance upon the after-acquired clause is misplaced

As noted in the Credibility findings, Connors and DeGroot knew that ILA Local 1970 represented employees at the Norfolk Yard before it recognized Teamsters Local 822. Given Page's testimony, it is more than likely they were aware that the ITS employees were already represented as well. Similar to *Everport Terminal Services, Inc*., 370 NLRB No. 28, a successor employer unlawfully relied upon a pre-existing contract requirement when it failed to consider the rights of already represented workers. In *Everport*, the new employer contends that its signed agreement required it to use ILWU represented employees for all positions, including the mechanics. The mechanics, until the new employer took over the operations, were represented by the Machinists. Similarly, H&M

decided to use the Teamsters based upon its incorrect interpretation of an after-acquired clause of its agreement with Teamsters Local 710 as it did not consider the rights of already represented employees at Norfolk Yard. Id.

H&M maintains that, for several reasons, its agreement with Teamsters Local 710 required that it notify Teamsters 710 when it acquired a new facility. The after-acquired language makes no statement that the clause's authority extends beyond Teamsters Local 710's jurisdiction.[55] Additionally, Teamsters Local 710 specifically told Connors it would refer the matter to the International union, which led to Connors' contacts with Teamsters Local 822, which was not governed by H&M's agreement with Local 710.

H&M also argues that to violate the established past practice, it would have faced an 8(a)(5) unfair labor practice. (R. Br. at 24-26.) Respondent's brief only cites Section 5(a) of the after-acquired clause. It ignores Section 5.2(b), which states:

> (b) If an Employer refuses to recognize the Union as set forth above and the matter is submitted to the National Labor Relations Board or any mutually agreed upon process for determination, and such determination results in certification or recognition of the Union, all benefits of this Agreement shall be retroactive to the date of demand for recognition.

Thus, after-acquired language in H&M's collective-bargaining agreement with Teamsters Local 710 provides for a way to resolve the question of this claimed past practice through the Board or any manner agreeable. Instead of opting for the processes identified in Section 5(b), H&M ironically claims fears it could have faced an unfair labor practice, which is where we are with this 11-day hearing.

Respondent H&M also argues that its past practices, based upon its bargaining relationships with Teamsters Local 710 and 705, required it to apply the after-acquired language to the Norfolk Yard and if it did not do so, it would have incurred an unfair labor practice charge. I examine both the testimony upon which H&M relies as well as the after-acquired language in H&M's collective-bargaining agreement with Teamsters Local 710.

H&M relies upon Connors' testimony. (R. Br. at 25-26, citing Tr. 2058-2059.) However, in examining Connors' testimony, the past practice only applied in the Chicago area. Because the practice is limited to the Chicagoland area, where Teamsters Locals 710 and 705 have jurisdiction, H&M cannot reasonably apply the after-acquired clause outside of the Chicago jurisdiction.

H&M cites several cases for the validity of after-acquired language, including *Houston Div. of the Kroger Co*., 219 NLRB 388 (1975). However, that case involved 2 stores that were transferred from a non-union region to a region in which a union was present with the after-acquired language. *Retail Clerks International Association Local No. 455, AFL-CIO v. NLRB*, 510 F.2d 802 (1975), reversing and remanding 208 NLRB 928 (1974) and 208 NLRB 939 (1974). As the employees in the 2 stores at issue in *Kroger* did not have any union representation when the union had a sufficient showing of interest

[55] In its initial position statement to the Region, H&M represented that it has a nationwide after-acquired facilities clause in its agreement with the Teamsters in Chicago. (GC Exh. 52, p. 441.) The agreement does not substantiate this position and H&M does not claim it specifically in its brief.

in both locations, the Board, after the remand, determined that the employer waived its rights for an election. Notable, too is the requirement that the union presented a majority of employees signing cards, which is not the case here. Additionally, in *Kroger*, the union was required to demonstrate it has a card majority. 219 NLRB at 389. H&M did not recognize a majority unit, but a unit made up of temporary employees and not a majority of employees, which will be discussed below. Also significant is that H&M applied after-acquired language outside of Teamsters Local 710's geographic region.

H&M also cites *Central Parking System*, 335 NLRB 390 (2001). There the after-acquired language was also at issue when an employer filed a petition for an election in an acquired parking garage. Again, the after-acquired language an existing collective-bargaining agreement required that the union provide proof of majority status at future locations in the San Francisco Bay area. The union in *Central Parking* expected to place the employees at the newly acquired facility in the already existing unit, not in a separate unit. 335 NLRB at 391. The Board dismissed the employer's petition and required the employer to follows the after-acquired language. Three distinctions between *Central Parking* and the current matter must be made: First, nothing in *Central Parking* demonstrates that the employees in the newly acquired location were already represented; second, the union was required to provide proof of majority; and third, the facility at issue was within the collective-bargaining agreement's locality of San Francisco Bay. Id. at 390-391.

Another case H&M cites involved garage management company and reliance upon an after-acquired clause. *MJS Garage Management*, 314 NLRB 172 (1994). However, there the employees signed cards pursuant to a valid after-acquired clause for a union and the employees were not coerced in their support for this union. Id. at 182-183. The employer instead recognized a different union for which no majority support was found.

H&M further relies upon *Alpha Beta Co.,* 294 NLRB 228 (1989). There the issue was an employer's failure to recognize the union that represented employees in the union's jurisdictional area when employees signed cards for representation. The Board found that the employer failed to give effect to the after-acquired clause when the union offered to submit the cards for an independent third-party review and refused to recognize the union. The board found that the employer waived its rights through the after-acquired clause despite the employer's argument that the clause failed to specify the method of the card check. Id. at 228-229. When the Board ascertained that the union had a "clear majority" of cards, it found that the employer violated Section 8(a)(5). Id. at 230. It further found that the employer recognized an "independent" union and signed agreements with that union in violation of Section 8(a)(2). Id. at 230-231.

H&M also contends that it lawfully agreed to a neutrality agreement with Teamsters 822. It cites a number of cases that show neutrality agreements can be valid. (R Br. at 27-28.) In *Dana Corp.*, 356 NLRB 256 (2010), the neutrality agreement issue arose in a unit of unrepresented employees, in which Dana agreed to recognize the union upon proof of majority status. Id. at 256-257. This case, therefore, is inapplicable. *Heartland Industrial Partners,* LLC, 348 NLRB 1081 (2006) involved a determination whether a neutrality agreement violated the hot cargo provision of the Act. *NLRB v. Cayuga Crushed Stone, Inc.* 474 F.2d 1380, 1382-1383 (2d Cir. 1973) involved an employer's withdrawal of recognition after it recognized the union and had no "reasonable basis" to question the union's majority status. H&M also cites a case involving an arbitrator's interpretation of the

agreement, which is not binding upon the Board in these circumstances. *International Union, UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002). The question is not whether neutrality agreements can be valid, but whether this particular neutrality agreement is valid. H&M provides little substance of what the neutrality agreement involved. Further, H&M does not demonstrate that the neutrality agreement overcomes the employees' selection of a bargaining agent when it would be required to remain neutral towards either union. For the foregoing reasons, H&M cannot rely upon its agreement with Teamsters Local 710.

3. H&M recognized a unit of temporary employees

a. Applicable law

An employer's voluntary recognition of a union is assessed for lawfulness at the time of recognition. *Elmhurst Care Center*, 345 NLRB 1176, 1177 (2005), enfd. (unpub.) 303 Fed. Appx. 895 (D.C. Cir. 2008). To determine whether H&M avoided liability for prematurely recognizing the Teamsters, a two-pronged test is applied:

> (1) An employer must employ a substantial and representative complement of its projected workforce, that is, the jobs or job classifications designated for the operation must be substantially filled, and
>
> (2) The employer must be engaged in normal business operations.

Elmhurst Care Center, 345 NLRB at 777. No exact mathematical formula is needed to demonstrate for premature recognition. Id. Failure to meet either of these prongs of the test results in a determination that the grant of recognition was unlawful. *Elmhurst Care Center*, 345 NLRB at 1177. The ultimate inquiry is whether employees "realistically have an opportunity to select a bargaining representative." Id. at 1184.

H&M was engaged in normal business operations at Norfolk Yard. However, H&M does not meet the first prong of the test, employing a substantial and representative complement of the workforce on January 23, 2019, not only due to its discriminatory failure to hire, but also because the traveling employees were temporary.

b. Parties' Positions

General Counsel contends that not only are the traveling employees temporary, but the cards are dated January 17, 2019, before they were working at the Norfolk Yard. General Counsel cites, inter alia, *Voith Industrial Services*, 363 NLRB No. 116 (2016) and *Vernitron Electrical Components, Inc*., 221 NLRB 464, 465 (1975), enfd. 548 F.2d (1st Cir. 1977).

H&M contends that it employed a representative complement on January 23, consisting of the employees from Chicago and New Jersey and the 3 former ITS employees who were hired. H&M relies upon *Yellowstone International Mailing, Inc*., 332 NLRB 386 (2000). H&M maintains that the traveling employees were not temporary employees, and "were recruited to, and did, travel to the Norfolk Yard for as long as it was necessary to ensure operations ran smoothly." H&M further maintains that the assignment was anticipated to extend to 90 days or longer and the length of the employees' tenure, at

the time the cards were signed, was uncertain, which created a permissible opportunity per *Marian Medical Center*, 339 NLRB 127, 128 (2003) and cases cited therein. (R. Br. at 32.) Respondent contends the assignments were anticipated to last 90 days and the length of was uncertain. Respondent cites, inter alia: *Marian*, supra; *NLRB v. SRDC, Inc*., 45 F.3d 328 (9th Cir. 1995); and, *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419 (2d Cir. 1996).

c. Findings

Although an employer may recognize a union without a demonstration of majority status, it risks §8(a)(2) liability when the facts show the employer recognized a minority union. *Windsor Place Corp*., 276 NLRB 445 n. 1 (1985). Despite sharing terms and conditions that permanent employees may enjoy, temporary employees are excluded from a bargaining unit when they have no reasonable expectation of reemployment, "such as when they are employed for a brief period of time and given no promise of permanent employment." *Phoenix New Times, LLC*, 370 NLRB No. 84, slip op. at 2, citing: *United Telecontrol Electronics, Inc*., 239 NLRB 1057, 1057-1058 (1978); *E.F. Drew & Co., Inc*., 133 NLRB 155, 156-157 (1961); *Sealite, Inc.,* 125 NLRB 619, 619-620 (1959); and, *Individual Drinking Cup Co., Inc*., 115 NLRB 947, 949 (1959).

To determine whether the employees are eligible for inclusion in the bargaining unit, the Board ascertains whether: (1) "'an employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event'", or (2) "'the satisfaction of the condition or contingency by which the temporary employment was created.'" *Curaleaf Massachusetts, Inc*., 370 NLRB No. 100, slip op. at 1 fn. 1 (2021), citing *Marian Medical Center*, 339 NLRB 127, 128 (2003). Also see *In re Catholic Healthcare West Southern California*, 339 NLRB 127, 128 (2003).

Certain courts support the "date certain" test for the first factor. See, e.g., *NLRB v. S.R.D.C., Inc*., 45 F.3d 328, 331-332 (9th Cir. 1995). There, the Ninth Circuit adopted the First Circuit's test for voting eligibility where an employee's temporary status is at issue. Id. at 332, citing *NLRB v. New England Lithographic Co*., 589 F.2d 29, 32 (1st Cir. 1978). The specific test, in an election setting, was to demonstrate that an alleged temporary employee had a "sufficiently finite" time in the job "to dispel reasonable contemplation of continued employment." *SRDC, Inc*., 45 F.3d at 332, citing *Caribbean Communications Corp. d/b/a St. Thomas-St. John Cable TV*, 309 NLRB 106, 108 (1992) (internal quotations omitted).

In a case H&M cites, the Second Circuit applied both the date certain and reasonable expectations tests, both of which resulted in 4 employees classified as temporary and ineligible to vote in an election. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419 1435,1436 (2d Cir. 1996). There the employees were hired only to work on a specific project and at the conclusion of the project, would not continue employment; therefore, these employees were temporary under the "date certain" test. Under the reasonable expectation test, despite testimony otherwise, the employees should have realized their jobs were not permanent as they received no benefits and never should have had a "reasonable expectation" of permanent employment. Another employee, in comparison, was advised that she would be hired for part-time work, and within a few months, would be full-time. That employee was considered eligible to vote because she would be retained after the project ended. Id. at 1435.

The H&M employees sent to work initially from Chicago and New Jersey to the Norfolk Yard were temporary employees. Contrary to H&M's position, the overall facts do not support a finding that the traveling employees were recruited to stay as long as necessary, nor were any offered a right to transfer to the Norfolk Yard. DeGroot, on cross examination, was asked whether he discussed with Lee how long the traveling team would be in place; DeGroot's answer was "I don't think we discussed timeframe. If anything, it was for as long as we needed." (Tr. 2005.) This statement does not necessarily point out how long these were needed and certainly does not support what happened. In contrast, the traveling employees, overall, had no expectation of staying more than 6 weeks, and in most cases, 2 weeks. Additionally, H&M's traveling employees were not offered any permanent positions at Norfolk Yard and no expectation of staying permanently at Norfolk Yard. Pursuant to *Kinney Drugs*, these employees had no reasonable expectation of continued employment at Norfolk Yard.

H&M hired permanent employees on or after January 23, 2019, such as Aughtman, who began employment on February 1, 2019. Lee told Aughtman that the traveling employees would stay only a month or so. Barrow testified that the traveling employees stayed 2 weeks. The testimony from a number of the traveling employees specified the length of time each would stay. The traveling H&M employees admitted that they traveled to the Norfolk Yard and limited their availability to work to 2 to 4 weeks, which demonstrates a limitation on time spent at Norfolk Yard. None expected to stay after the training period was over, which demonstrates a limitation by task. Darvalics was the only employee who returned, which was limited to a week.

None of these employees had an expectation of permanent employment at the Norfolk Yard. The traveling employees continued to receive their pay through their home locations and paid union dues to their respective locals, not to Local 822. They had no intent to return. Taken from the employees' perspective, they were aware that they were employed by their "home" yards and sent only temporarily to Norfolk Yard for limited tasks and time.

The cards that H&M counted towards the "substantial and representative complement" were those of a temporary workforce, not of any person who would be employed in the bargaining unit after the temporary workforce left. They would not share in the continuation of representation after they left. See *University of Chicago v. NLRB*, 944 F.3d 694, 700-701 (7th Cir. 2019), enfg. 367 NLRB No. 41 (2018) (temporary employees may lack sufficient community of interest with unit). As such, they are ineligible for inclusion in a bargaining unit. *Phoenix New Times, LLC*, 370 NLRB No. 84, slip op. at 2 (2021). Respondent H&M may not rely upon a unit consisting of ineligible temporary employees when recognizing Teamsters Local 822.

For the proposition that despite plans to expand the workforce, it had a substantial and representative complement on January 23, H&M relies upon *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000). *Yellowstone* is a representation case in which the Board decided to direct an immediate election even when the employer intended to expand its workforce. At the time, the formula used for an existing complement to be "substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the unit workforce to be employed in the near future." Id. Each situation is approached on a case-by-case basis. *Toto Industries (Atlanta), Inc.*, 323 NLRB 645 (1997). Neither *Yellowstone* nor *Toto* involved issues of

whether the unit workforce included temporary employees counting towards a substantial and representative complement.

In applying the formula from *Toto*, H&M did not have a substantial and representative complement. Also see *Shares, Inc.*, 343 NLRB 455 n. 2 (2004), enfd. 433 F.3d 939 (7th Cir. 2006).[56] As the parties note, 14 employees were eventually hired. However, none of these employees signed cards on January 23, the date of recognition. Therefore, at the time it recognized Teamsters Local 822, H&M did not employ a substantial complement of permanent employees who would be located at the yard, particularly while H&M was still identifying potential candidates for jobs. Therefore, in recognizing a unit made up of temporary employees, H&M prematurely recognized Teamsters Local 822 and provided Teamsters Local 822 unlawful assistance in violation of Section 8(a)(2). *Ladies' Garment Workers (Bernhard-Altmann Texas Corp.)*, supra.

4. H&M provided unlawful assistance to Teamsters Local 822 with gathering the cards and subsequent recognition

The Act places a line between permissible cooperation between an employer and a union versus interference with the formation of a bargaining unit when the result interferes with employees' organizational rights. *NLRB v. Midwestern Personnel Services, Inc*., 322 F.3d 969, 977 (7th Cir. 2003), enfg. 331 NLRB 348 (2000). None of the 14 employees hired permanently for Norfolk Yard signed cards until February 2019, almost 1 month after H&M recognized Teamsters Local 822. For the temporary unit that H&M recognized for Norfolk Yard, H&M denies it unlawfully provided access to H&M employees or otherwise unlawfully assist in organizing efforts. (R. Br. at 28-30) It contends DeGroot did not assist with or was involved with getting cards signed or that any evidence shows that DeGroot provided Local 822 with "unfettered access to employees." H&M relied upon the testimony of Teamsters Local 822, because the record is devoid of evidence that DeGroot himself was in contact with Teamsters Local 822 It also notes that an employer can provide unions with access to employees per: *Dana Corp*., 356 NLRB 256 (2010); *Verizon Information Systems*, 335 NLRB 558 (2001); and, *Heartland Industrial Partners*, 348 NLRB 1081 (2006).

The employer's intent or the employees' subjective beliefs of coercion are given no heed in assessing if the employer unlawfully assisted and coerced employees "in the exercise of their organizational rights." *Midwestern Personnel Services, Inc*., 322 F.3d at 977-978. Instead, a number of non-exclusive factors are examined:

> [W]hether the employer solicited contact with the union; the rank and position of the company's solicitor; whether the employer silently acquiesced in the union's drive for membership; whether the employer shepherded its employees to meetings with a prospective union; whether the signing of union authorization cards was coerced; and whether the employer quickly recognized the assisted union after the employees signed authorization cards yet exhibited prejudice against another union selection by the employees.

Midwestern Personnel Services, 322 F.3d at 977-978.

[56] H&M further cites *Island Oasis Mfg., LLC*, 2011 WL 4688629 (2011). This case is an administrative law judge's decision, which is non-precedential.

The two initial factors, the employer soliciting contact with the union and the rank and position of the company's solicitor, show that H&M favored Teamsters, particularly Teamsters Local 822, to represent the employees at the Norfolk Yard. H&M, by President Connors, solicited contact with one of the Teamsters locals that represented employees in Chicago, allegedly due to its collective-bargaining agreement with Teamsters Local 710. Connors admitted that Local 710 had no jurisdiction in Virginia. The Teamsters then put him in touch with Teamsters Local 822 in the Norfolk area. Connors met with the Teamsters representative in Virginia. These two factors favor unlawful assistance. *Midwest Personnel Services*, 322 F.3d at 978.

DeGroot was not silent about the traveling employees' meeting with or signing cards for Teamsters Local 822. Supervisory influence taints a union card's majority when a supervisor's participation may have deprived employees to exercise their free choice to select a union. *Waldinger Corp.*, 311 NLRB 544, 545-546 (2000), affd. 262 F.23d 1213 (11th Cir. 2001). To find that the supervisor created taint, evidence must demonstrate "the supervisor's activity was such as to have implied to employees that their employer favored the union" or, alternatively, that employees were coerced to sign the card due to "fear of supervisory retaliation." *Waldinger Corp.*, 311 NLRB at 546.

Here, DeGroot, the manager for the Chicago terminals, is considered a high ranking official. His actions directed employees to meet with Teamsters Local 822 by telling employees to meet for breakfast. The evidence demonstrates that DeGroot also told the travelers to sign the cards. Distel testified that DeGroot told them to sign cards. Frayne testified that DeGroot also asked them to sign cards. Based on this testimony, someone in H&M's organization had to be in touch with Teamsters Local 822 to arrange the meeting. Connors, DeGroot and the Teamsters Local 822 agents all denied any knowledge, which I discredit.

I credited the H&M traveling employees' testimonies over DeGroot and Connors about their presence at the breakfast on January 23. I find that their presence, particularly DeGroot's, when the employees could be monitored for compliance in signing the cards for Teamsters Local 822 is coercive. *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977). Senteno specifically testified that he was late to breakfast but saw both DeGroot and Connors in the lobby. Based upon this testimony, I find that he missed DeGroot's directions.

Despite DeGroot and Connors' denial about their presence at the hotel breakfast, Connors admitted it was likely that DeGroot saw the cards sufficient for recognition and explained how Connors knew Teamsters Local 822 had a sufficient number of cards to warrant recognition. These admissions against interest are binding upon H&M. It also connects the dots about how DeGroot knew that Teamsters Local 822 collected the cards. With the testimonies of the temporary employees present at breakfast, DeGroot was present and knew Teamsters Local 822 collected the cards.

The cards themselves are incorrect due to failure to include what Teamsters local the employees selected and the faulty dates on the card. H&M feigns ignorance of the tainted cards because it never looked at the cards. Regarding the cards failing to identify which Teamsters local the traveling employees selected, Jacobs admitted that the cards were invalid because they did not include the local union number. Because scienter is not an element in Section 8(a)(2), H&M is legally responsible for its unlawful recognition when the traveling employees made no selection to be represented by Teamsters Local 822.

The dates on the signed cards collected by Teamsters 822 raise questions about the validity. The cards are primarily dated January 17, 2019, and employment date is also entered on January 17. However, hotel and travel records demonstrate that the temporary employees were not in the Norfolk, Virginia vicinity until at least January 21, 2019 ---- 4 days later. The H&M traveling employees testified that they signed the cards on the same day they went to work at the Norfolk Yard, which is January 23, 2019. No one had an explanation why the cards were so dated. This discrepancy creates a legal question of whether to count these cards towards the majority. *Holly Farms Corp*., 311 NLRB 273, 280-281(1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). Further, if cards are collected at a time when a union is no longer organizing, those cards cannot count towards a majority. Here, Teamsters Local 822 could not have been organizing the employees for H&M's Norfolk Yard work when the employees were not present for signing the cards. The problems with the cards also support a finding that H&M provided unlawful assistance to Teamsters Local 822.

An additional flaw is the cards allegedly supporting the recognized unit. Darvalics, a mechanic, was included in the card count. Connor's recognition does not state what unit is recognized. Neither Connors nor any of the Teamsters Local 822 agent identify what that unit would be as part of their "neutrality agreement." Five days after recognition, Teamsters Local 822 and H&M negotiated an agreement in which the bargaining unit did not include mechanics. Thus, H&M based its recognition for recognized a unit in which the cards included a mechanic, who was not intended to be in the bargaining unit. Again, as scienter is not an element and even if I credied DeGroot's denials he knew who signed the cards, H&M again gave unlawful assistance to Teamsters Local 822.

H&M's speedy recognition of Teamsters also points to unlawful assistance. *Vernitron Elec. Components, Inc*., 548 F.2d at 26. Connors acknowledged H&M's recognition 33 minutes after Teamsters Local 822 demanded it. Connors obtusely admitted that he spoke with DeGroot, who assured him Teamsters Local 822 had a majority of the unit. I find this statement is an admission against interest and explains DeGroot's presence at the hotel while the temporary employees signed the cards for Teamsters Local 822. I therefore must find that Connors had a foregone conclusion that a sufficient number of traveling employees signed cards.

Post-recognition conduct also is considered in determining wither an employer gave a union unlawful assistance. *Ryder System*, 280 NLRB 1024 (1986), enfd. (unpub.) 842 F.2d 332 (6th Cir. 1988). H&M gave further assistance by permitting Jacobs and others in the Norfolk Yard breakroom to solicit cards from February 1, 2019 forward. As H&M had already unlawfully recognized Teamsters Local 822, H&M facilitated access to the employees, which gave Teamsters Local 822 the opportunity to tell the employees it already was its collective-bargaining representative. *Safeway Stores*, 276 NLRB 944 fn. 2 (1985). Also, by permitting Jacobs onto the facility rather than Basnight, the ILA representative, H&M Terminal Manager Lee demonstrated a preference for the Teamsters. This factor also demonstrates unlawful assistance. *Duane Reade, Inc*., 338 NLRB 943, 943-944 (2003), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004).

The Teamsters Local 822 cards obtained after recognition cannot support a majority when recognition was already granted unlawfully. *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB 1143, 1153-1154 (2006), enfd. (unpub.) 265 Fed.Appx. 74 (3d Cir. 2008). Similarly, as discussed above, H&M's reliance upon a supposed

neutrality agreement with Teamsters Local 822 is misplaced: H&M was required to be neutral when faced with two unions.[57]

General Counsel also alleges that H&M provided "unfettered access" in the hotel, which resulted in unlawful assistance. While I agree that H&M and Teamsters Local 822 somehow arranged the meeting with the temporary employees on the morning on January 23, I do not necessarily find that H&M had control over the breakfast area in the hotel. As such, I dismiss the portion of the complaint alleging H&M violated Section 8(a)(2) by providing unfettered access to the temporary employees at the hotel.

C. When Did H&M Have a Substantial and Representative Complement?

Determining the point at which an employer hires a representative complement of employees to determine its bargaining obligation varies from case to case and is fact specific. *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (2d Cir. 1981). Because the traveling H&M employees were temporary, they cannot be counted in a "substantial and representative" complement. In addition, I conclude that H&M discriminatorily refused many of the former ITS employees, which violates Section 8(a)(3). It instead recognized a unit of temporary employees represented by Teamsters Local 822, in violation of Section 8(a)(2). But for these discriminatory patterns, H&M would have hired a majority of former ITS employees for the Norfolk Yard. By recognizing Teamsters

[57] In *Garner/Morrison, LLC*, 366 NLRB No. 184, slip op. (2018), on remand from 826 F.3d 460 (D.C. Cir. 2016), the employer maintained an 8(f) agreement with one union, but met with that union and a second union. The employer notified the first union that it would not continue the 8(f) relationship. The second union arranged to meet the employees at a hotel conference room, for which it paid, at the second union's scheduling. The employees who desired to attend did so on unpaid time and the employees were not required to attend. The employer's part-owner addressed the present employees that the first union's 8(f) arrangement expired and endorsed the second union with statements about the second union being "a good deal" and "better for the Company and for the men." Id. at --- (Internal quotations omitted). The second union's officials then addressed the employees for an hour regarding the contract, wages, and benefit plans. When that presentation finished, the union officials directed the employees to the back of the meeting room where the enrollment forms for insurance and authorization cards were distributed by the union officials to the employees. While the employees went to the back of the room, the employer's 3 owners and a supervisor remained in the room, but 60-70 feet away from the back, so that the employer representatives could not see the documents. The employer's representatives did not know that the second union intended to distribute authorization cards at the meeting. After the meeting, the second union presented the employer with the authorization cards, which a majority of bargaining unit employees signed. The employer quickly entered into a §9(a) recognition agreement with the second union. The Board majority noted that an employer is permitted to express preference for one union over another even when no unlawful threats or promises are made. Id. at , citing *Amboy Care Center*, 322 NLRB 207, 207-208 (1996). It found that the mere presence did not establish that the situation was coercive, but noted that, under different facts, it could be "unlawful surveillance, interference, or assistance in violation of Section 8(a)(1) and (2) of the Act . . . . " Id., slip op. at ---. Member Pearce dissented, finding that the employer's presence during card collection was unlawful surveillance and assistance and further tainted the second union's showing of support. Id., slip op. at 4-7.

I find the current situation is differentiated as: 1) no 8(f) relationship existed here; 2) *Garner/Morrison* did not involve a successorship, much less *Love's Barbeque* hiring issues when the employer violated Section 8(a)(3); 3) even without H&M's unlawful assistance in collecting the cards, it still violated Section 8(a)(2) by recognizing a unit of temporaries, which also was not at issue in *Garner/Morrison*.

Local 822 at a time when it did not represent the employees of Norfolk Yard, H&M also demonstrates its preference for that union over the rights of the represented employees. This factor also points towards the above finding of discrimination. See generally *Voith Industrial Services*, supra. But for H&M's unlawful refusal to hire the former ITS employees, it would have had a substantial and representative complement on January 23, 2019.

The next analysis for successorship considers whether the historic bargaining unit, in which ILA Local 1970 was certified as the bargaining agent, remained appropriate.

V. AS HISTORIC BARGAINING UNIT REMAINS APPROPRIATE, H&M VIOLATED SECTION 8(A)(5) BY FAILING TO RECOGNIZE ILA 1970

Critical to a finding of a successorship is a determination that the bargaining unit of the predecessor employer remains appropriate for the successor employer." *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994) enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997). The party challenging a historical unit, here H&M, bears the burden of showing that the predecessor's unit is no longer appropriate. *Stein, Inc.*, 369 NLRB No. 11 fn. 6, reh'g denied (2020) (heavy evidentiary burden to show historical bargaining unit is repugnant to the Act); *Banknote*, 315 NLRB at 1024.[58]

The Norfolk Yard bargaining unit that was certified pursuant to the Board-conducted election was:

> All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics, excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

The existing bargaining unit is evidence of the appropriateness of the separate bargaining units. *NLRB v. ADT Sec. Services, Inc.*, 689 F.3d 628, 634 (6th Cir. 2012). H&M is required to demonstrate compelling circumstances to overcome this presumption. *Community Hospitals of Calif.*, 305 F.3d at 1085; I find that H&M does not demonstrate compelling circumstances to overcome this presumption.

The Board applies a multi-factor test that assesses:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 6 (2017) (citing *United Operations, Inc.*, 338 NLRB 123 (2002)).

[58] H&M analyzes this factor as an insufficient continuity of the appropriate bargaining unit due to shrinkage of the unit and its recognition of Teamsters Local 822. (R. Br. at 49.) It does not discuss the tests stated herein.

When a group of employees has a "significant history of representation by a particular union presumptively constitute an appropriate bargaining unit." *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003). The party contesting the presumption must demonstrate compelling circumstances to overcome the significance of bargaining history. Id; *ILWU v. NLRB*, 890 F.3d at 1111, citing *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015). The matter was discussed in *Walden Security, Inc.*, 366 NLRB No. 44, slip op. at 11-12 (2018):

> Critical to a successorship finding is whether the bargaining unit of the predecessor employer remains appropriate for the successor employer. *Paramus Ford, Inc.*, 351 NLRB 1019, 1023 (2007). In *Paramus Ford*, the employer challenged the appropriateness of a historical unit of service and parts department employees. Id. . . . . Under extant Board law, the unit sought by the Union and alleged in the complaint need not be the only or even the most appropriate unit; all that is required is that the unit be an appropriate unit. (Emphasis in original.) Id., citing *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Gregory Chevrolet, Inc.*, 258 NLRB 233, 238 (1981).

The factors applied the traditional community of interest are: bargaining history; integration of operations; centralization of management and administrative control; geographic proximity; similarity of working conditions; skills and functions; common control of labor relations; degree of separate daily supervision; and the degree of employee interchange. *NV Energy, Inc.*, 362 NLRB 14, 16 (2015), citing, inter alia, *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). Bargaining history is given significant weight to such an analysis. *PCMC*, 359 NLRB at 1211. Bargaining history is treated the same, regardless of whether the unit was certified or voluntarily recognized. *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 871 (2d Cir. 1981), enfg. 246 NLRB 192 (1979).

The evidentiary burden to overcome the significance of bargaining history is heavy, requiring "compelling circumstances". *Banknote*, supra, citing *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007).The history of representation with the ITS unit at Norfolk Yard was relatively short, with no history of bargaining as ITS decided to discontinue its relationship with Norfolk Southern about the same time it likely learned of unionization efforts. The unit was certified after a Board-conducted election. Although bargaining history is given significant weight, the remaining factors indicate that the certified unit remained an appropriate unit. See generally *Lockheed Engineering Co.*, 271 NLRB 119 (1984) (successor employer may have a bargaining obligation with a union even though although the union had never reached a collective-bargaining agreement with the predecessor employer).

Integration of operations points towards continued appropriateness of the historic unit. The work at Norfolk Yard was essentially unchanged. Centralization of management and administrative control is now with H&M headquarters, similar to how ITS managed the unit. The day-to-day management and administrative controls, however, remained in Norfolk Yard. Geographic proximity is unchanged. The work for which H&M contracted and performed is still at Norfolk Yard. The working conditions, along with skills and functions, were unchanged except that H&M did not initially have the contract for the crane maintenance, which it now performs. H&M employs groundsmen, hostler drivers, crane operators and mechanics. The variance in the bargaining unit from ITS to H&M is considered negligible. Greater variances than what is exhibited here "have been found to

be insubstantial." *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089, 1096-1097 and n. 7 (9th Cir. 1999) and cases cited therein.

General Counsel also points out that the only difference between the ILA 1970 bargaining unit and the Teamsters Local 822 unit recognized by H&M is the Teamsters unit makes not mention in the unit description of container, chassis and lift mechanics. (GC Br. at 79, citing GC Exhs, 183, 186.) Despite the lack of mechanics in the stated bargaining unit, the Teamsters Local 822 agreement contains pay scales for the mechanics. In addition, as General Counsel notes, Teamsters Local 822 accepted membership cards from the mechanics.

H&M presents no evidence that common control of labor relations has changed. Daily supervision was unchanged as H&M retained Lee and Barrow, the terminal manager and operations manager respectively. H&M also retained Williams as an administrative assistant, performing payroll duties. This factor points towards appropriateness of the same bargaining unit.

Employee interchange can be temporary or permanent. H&M brought temporary employees, most of whom had only 2 to 3 weeks stays. Not all of the temporary employees were present when H&M continued to hire the rest of its permanent cadre of employees at Norfolk Yard. As for permanent interchange, none of the temporary traveling H&M employees were offered the opportunity to permanently relocate to the Norfolk Yard. As H&M presented no evidence that any Norfolk Yard employees traveled or took permanent assignments in its other facilities, the lack of interchange points to retention of the historic unit.

H&M does not meet the "heavy burden" showing that the historic unit was not an appropriate unit. Despite ILA's recent certification without history of bargaining between ILA Local 1970 and ITS, the remaining factors point to continued appropriateness of the certified unit. Because the historic bargaining unit is an appropriate unit, Respondent H&M was required to recognize ILA Local 1970. *North Hills Office* Services, 342 NLRB 437, 444 (2004).

Respondent contends that it could not recognize ILA Local 1970 because it lawfully recognized Teamsters Local 822 on its first day of operations. (R. Br. at 49.) With the finding that H&M avoided hiring employees from the ITS's former workforce to fill its a majority of its complement due to discriminatory reasons and unlawfully recognized Teamsters Local 822, the inference is that substantially "all of the former employees would have been retained absent unlawful discrimination." *Allegheny Graphics*, 307 NLRB 1253, 1258 (1992),[59] enfd. 993 F.2d 878 (3d Cir. 1993). H&M is not permitted to benefit from this unlawful conduct and is required to recognize and bargain ILA Local 1970. Its failure to do so violates Section 8(a)(5). *NLRB v. CNN America, Inc.*, 865 F.3d 740, 760 (D.C. Cir. 2017), enfd. in rel. part 362 NLRB 293 (2015) and 361 NLRB 439 (2014).

[59] Quoting *American Press*, 280 NLRB 937, 938 (1986), enfd. in rel. part 833 F.2d 621 (6th Cir. 1987).

V. H&M VIOLATED SECTION 8(A)(5) BY MAKING UNILATERAL CHANGES AND REFUSING TO BARGAIN WITH ILA AND VIOLATED SECTION 8(A)(2) BY APPLYING TERMS AND CONDITIONS OF EMPLOYMENT NEGOTIATED WITH TEAMSTERS LOCAL 822

Respondent contends that it could not recognize ILA Local 1970 because it had already recognized Teamsters Local 822 by the time ILA Local 1970 demanded recognition.

Normally a *Burns* successor usually would have the right to make unilateral changes when it announces hiring. *NLRB v. Burns Security Services*, 406 U.S. 272, 280-281 (1972), *Systems Management*, 292 NLRB 1075, 1095 (1989), enfd. in rel. part 901 F.2d, reh'g and reh'g en banc denied (3d Cir. 1990). When an employer acts with discriminatory motives in violation of Section 8(a)(3), the chance to make those unilateral changes evaporates and it cannot set initial terms of hiring. *DAKA*, 310 NLRB at 210; *Systems Management,* 292 NLRB at 1095, citing, inter alia, *Love's Barbeque*, 245 NLRB at 78, 62, 82 (1979). Also see: *Laro Maintenance Corp. v. NLRB*, 56 F.3d at 227. With the *Love's Barbeque* violation, a respondent employer, such as H&M, is required to continue the predecessor's terms and conditions of employment and bargain changes with the union. Because H&M failed to recognize and bargain changes with ILA Local 1970, H&M made unlawful unilateral changes to the terms and conditions of the employees it hired on January 23, 2019 and in the days following, which constitutes a violation of Section 8(a)(5) and (1). *Pressroom Cleaners*, 361 NLRB 643, 643-644, reconsideration denied 361 NLRB No. 133 (2014). Also see *Capital Cleaning Contractors,* 147 F.3d at 1008.

H&M made further unlawful unilateral changes when it entered into a collective-bargaining agreement with the Teamsters. The effective date of that agreement is January 23, 2019, so that the violation is effective for January 23. Entry into that agreement and application of its terms violates Section 8(a)(2) as well as Section 8(a)(5).

This situation is distinguishable from *Stein, Inc.*, 369 NLRB No. 11 (2020). There, despite finding the successor violated Section 8(a)(2) by recognizing a different unit than what existed with the predecessor, the Board determined the successor employer did not forfeit its rights to set initial terms and conditions of employment. Id. The Board relied upon its finding that the successor never told the employees they would not have a union there. Unlike *Stein*, here successor employer H&M repeatedly told former ITS employees and Aughtman that they would not be hired because of their union activity.

Respondent does not dispute that, 5 days after it recognized Teamsters Local 822, Connors signed a collective-bargaining agreement. The non-temporary H&M employees who signed cards did so after H&M already unlawfully recognized Teamsters Local 822. As H&M based its bargaining and eventual agreement upon a flawed recognition of a unit of temporary employees, the collective-bargaining agreement constitutes "unlawful assistance in violation of Section 8(a)(2) and (1)." *Executive Cleaning Services*, 315 NLRB 227, 237 (1994), enfd. in rel. part sub nom *AT&T v. NLRB*, 67 F.3d 446, 452 (2d Cir. 1995).

VI. RESPONDENT'S AFFIRMATIVE DEFENSES

The proponent of an affirmative defense bears responsibility for establishing it. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014), citing *Broadway*

Volkswagen, 342 NLRB 1244, 1246 (2004), enfd. 483 F.3d 628 (9th Cir. 2007). Respondent pled 16 affirmative defenses in response to General Counsel's First Amended Complaint, with the sixteenth the catch-all that Respondent H&M retains the right to assert other affirmative defenses. Many of the affirmative defenses are incorporated into the discussion of the unfair labor practices above.

H&M also claims certain complaint allegations do not fall within the 6-month statute of limitations provided in Section 10(b) of the Act. At hearing I instructed the parties to include their 10(b) arguments in their post-hearing briefs. (Tr. 1212-1213.) H&M's brief does not discuss Section 10(b). As proponent of this affirmative defense, H&M therefore failed to establish its Section 10(b) defense.

CONCLUSIONS OF LAW

1. Respondent H&M International Transportation, Inc. is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. International Longshoremen's Association, Local 1970, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Party-in-Interest Teamsters Local Union No. 822, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.
4. The following employees are supervisors for H&M within the meaning of Section 2(11) of the Act and agents of H&M within the meaning of Section 2(13) of the Act:

a. Charles Connors	President and COO
b. Jesse DeGroot	General Manager, Intermodal Operations
c. Anthony Lee	Norfolk Yard Terminal Manager (ending April 30, 2019)
d. Leander Barrow	Norfolk Yard Operations Manager (ending May 5, 2019)
	Norfolk Yard Terminal Manager (beginning May 6, 2019)
e. Alan Young	Norfolk Yard Operations Manager (beginning May 6, 2019)

5. Since January 23, 2019, Juanita Williams was H&M's Administrative Assistant at Norfolk Yard and has been an agent for H&M within the meaning of Section 2(13) of the Act.
6. Respondent H&M was a successor to predecessor ITS at the Norfolk Intermodal Yard.
7. The following H&M employees constitute a Unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics, excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

8. On December 18, 2018, ILA Local 1970 was certified as the exclusive collective-bargaining representative of the Union employed by ITS.
9. From December 18, 2018 to January 23, 2019, based on Section 9(a) of the Act, ILA Local 1970 served as the designated exclusive collective-bargaining

representative of the Unit employed by ITS at the Norfolk Yard.

10. From January 23, 2019 to present, Respondent H&M failed and refused to recognize ILA Local 1970 as the exclusive collective-bargaining representative of the appropriate historic unit, in violation of Section 8(a)(5) and (1).
11. Respondent H&M violated Section 8(a)(1) when Terminal Manager Lee told employees that they would not be hired because of their union activities on behalf of ILA Local 822.
12. Respondent H&M violated Section 8(a)(2) and (1) of the Act by:
    a. Assisting and recognizing Teamsters Local 822 at a time when the purported unit consisted of temporary employees; and,
    b. Entering into a collective-bargaining agreement with Teamsters Local 822 for an assisted and invalid bargaining unit.
13. Since January 23, 2019 to present, Respondent H&M violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire predecessor ITS employees because of their union sympathies and activities on behalf of ILA Local 1970. The employees are: Michelle Clarke; Vernon Cuffee; Rayeon Ricks Jordan; Mark Keating; Jamel Christopher Lucas; Michael McManus; Ernest Perry; and Earl Smith.
14. Since January 23, 2019 to about August 2019, H&M failed and refused to hire or consider for hire Darryl Halsey, who applied for employment, in violation of Section 8(a)(3) and (1).
15. Since January 23, 2019 to November 2019, H&M refused to hire or consider for hire ITS employees Carlos Jones and Ron Spencer, who applied for employment, in violation of Section 8(a)(3) and (1).

REMEDY

The ideal remedial order restores "the situation, as nearly as possible, to that which would have been obtained but for [the unfair labor practices]." *Pace Industries, Inc. v. NLRB*, 118 F.3d 585, 593 (8th Cir. 1997), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp*., 313 U.S. at 197. Restoration of the status quo ante, including reinstatement and backpay, is necessary when a new employer unlawfully discriminates in hiring to avoid a bargaining obligation. *Galloway School Lines, Inc*., 321 NLRB 1422, 1425 (1996); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997), enfg. 317 NLRB 1011 (1995), cert. denied. 522 U.S. 948 (1997).

Respondent H&M shall cease and desist in discriminating against the employees previously represented by the ILA Local 1970 at the Norfolk Yard or any other employees not represented by the Teamsters Local 822. *International Union of Operating Engineers, Stationary Engineers Local 39 (Mark Hospital Intercontinental Hotel),* 357 NLRB 1683, 1683 fn. 1 (2011). H&M is required to offer employment to all employees it failed to hire on January 23, 2019, and not reemployed by Respondent H&M in their previous positions, and to make them whole for any loss of earnings and other benefits suffered as a result of H&M's unlawful failure to hire. Backpay shall be computed in accordance with *F.W. Woolworth* Co., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. H&M also will be required to remove from its files and records any and all references to the unlawful layoffs and notify the affected employees in writing that this has been done and that the failure to hire will not be used against them in any way. *PCMC*, 362 NLRB 988.

The Board imposes a status quo ante remedy to restore the employees to the rightful position they would have been in, but for the successor's unlawful discriminatory hiring. *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358 (5th Cir. 2017), and cases cited therein. H&M shall also be required to rescind, on ILA Local 1970's request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made on or after January 23, 2019, including, but not limited to, those changes made pursuant to its collective-bargaining agreement with Teamsters Local 822. H&M must make all unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The order shall not be construed as requiring or authorizing H&M to rescind any improvements in the terms and conditions of employment unless requested to do so by ILA Local 1970. *MJS Garage Management Corp. d/b/a Promenade Garage Corp.*, 314 NLRB 172, 172-173 (1994). The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[60]

In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also the reimburse employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

H&M shall be ordered to cease and desist from assisting Teamsters Local 822 by assisting in the organization of its employees and by recognizing and granting exclusive collective-bargaining rights to Teamsters Local 822. *Windsor Castle Health Care Facilities*, 310 NLRB 579, 593-595 (1993), enfd. as modified 13 F.3d 619 (2d Cir. 1994). H&M shall be ordered to withdraw recognition from the Teamsters Local 822 as the collective-bargaining representative of the unit employees unless and until Teamsters Local 822 has been certified by the Board as their collective-bargaining representative. *PCMC*, 362 NLRB at 988.

Respondent H&M is ordered to cease and desist from applying the negotiated Teamsters Local 822 collective-bargaining agreement, including its dues checkoff provisions, and any extension, renewal, or modification thereof, to the unit employees. *MV Public Transportation, Inc.*, 356 NLRB 867, 868 (2011); *St. Helens Shop 'N Kart*, 311 NLRB 1281, 1281 fn. 2 (1993); *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 555 (2015), enfd. 651 Fed. Appx. 34 (2d Cir. 2016).

H&M will be ordered to reimburse all employees who joined Teamsters Local 822 on or since January 23, 2019, for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have withheld from their pay pursuant to its Agreement with Teamsters Local 822, together with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1997) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Windsor Castle Health Care Facilities*, 310 NLRB 579, 594 (1993), enfd. in rel. part 13 F.3d 619 (2d Cir. 1994). This reimbursement includes dues paid through dues checkoff pursuant to the collective bargaining agreement, which was made pursuant to unlawful

[60] In *Everport,* 370 NLRB No. 28 (2000) fn. 4, the Board distinguished *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019). *Ridgewood* was inapplicable where it was clear "that the successor employer would not have hired all or substantially all of the predecessor's employees."

recognition of a unit of temporary employees. *NLRB v. Vernitron Elec. Components, Inc., Beau Products Div.*, 548 F.2d 24, 26-27 (1st Cir. 1977). The rationale for this remedy must demonstrate a "causal relationship" between the unfair labor practice(s) and the payment of dues. Id. at 27, citing *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 654-655 (1961). As in *Vernitron*, 548 F.2d at 27, Respondent H&M entered into a collective bargaining agreement with a dues checkoff provision; the collective bargaining agreement was with a union that did not represent a majority of employees. Here, because H&M gave unlawful assistance to the Teamsters and entered into collective bargaining agreement that is ordered to have no effect, the employees must be put back to their "make whole" status.[61]

Respondent H&M shall be ordered to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award. H&M shall file a report with the Regional Director of Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. In addition, H&M shall file with the Regional Director for Region 5 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging*, 370 NLRB No. 76 (2021).

Respondent H&M must also retroactively restore the preexisting terms and conditions of employment that were in effect for ITS employees as of January 22, 2019 and continue these terms and conditions until H&M and the ILA reach a new agreement or come to impasse. *Adams & Associates, Inc.*, 871 F.3d 358, 373 (5th Cir. 2017), enfg. 363 NLRB 1923 (2016). A successor employer that unlawfully discriminates to avoid a bargaining obligation is not free to set unilaterally initial terms and conditions of employment. See generally *Smith & Johnson Construction*, 324 NLRB at 970. Had H&M acted lawfully in hiring the predecessor's employees, it would have been free to set terms and conditions of employment for the bargaining units. *Burns*, 406 U.S. at 281-283. By discriminatorily hiring its employees and ensuring that it would recognizing Teamsters Local 822, H&M waived that right.

Because H&M waived that right, H&M is ordered to reinstate the status quo ante, to make employees whole by remitting all wages and benefits absent H&M's unlawful conduct, until it negotiates in good faith to agreement or to impasse. This remedy is necessary to prevent H&M from benefitting from its unlawful conduct, including unlawfully applying the negotiated collective bargaining agreement with Teamsters Local 822 to the employees, and give the bargaining process a chance to work. *U.S. Marine Corp*., 944 F.2d at 1322-1323; *NLRB v. Advanced Stretchforming Int'l, Inc*., 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001). Therefore, H&M is ordered to recognize and, on request, bargain with ILA Local 1970 as the bargaining representatives of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. Also *see Carib Inn of San Juan*, 312 NLRB 1212, 1212 fn. 4 (1993), enfd. sub nom. *NLRB v. Horizons Hotel Corp*., 49 F.3d 795 (1st Cir. 1995).

[61] The Court in *Vernitron* noted that the union was not a respondent, so the union could not be ordered to bear any of the responsibility of dues apportionment; likewise, H&M, as the "sole respondent" alone shoulders the costs of this remedy. 548 F.2d at 27.

I recommend an affirmative bargaining order as a remedy for H&M's unlawful recognition of Teamsters Local 822, discriminatory hiring to avoid a bargaining obligation with ILA Local 1970, and failure to recognize and bargain with ILA Local 1970. *Caterair International*, 322 NLRB 64 (1996). This remedy is the traditional Board requirement for a Section 8(a)(5) "refusal to bargain with the lawful collective-bargaining representative in an appropriate unit of employees." Id. at 68. I recommend that the parties be required to bargain in good faith for a reasonable period of time with a temporary decertification bar. *Everport*, 370 NLRB No. 28 at n. 5 (Board orders bargaining for a reasonable period of time rather than the administrative law judge's recommendation of a 12-month period pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962)).

At times, the U.S. Court of Appeals for the District of Columbia has required the Board to justify the affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-739 (D.C. Cir. 2000). This analysis balances three areas: "(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. *Vincent*, 209 F.3d at 738. In balancing these three factors, I find, for reasons similar to *Everport*, supra, the affirmative bargaining order in this case is warranted.

First, the affirmative bargaining order will vindicate the Section 7 rights of the unit employees. H&M denied these employees of the benefits of collective bargaining with their designated representatives by prematurely recognizing the Teamsters when it had not hired anyone in those units yet, by its discriminatory hiring to avoid recognizing the ILA-represented employees, thereby refusing to recognize and bargain with ILA Local 1970. Teamsters accepted recognition and negotiated a collective-bargaining agreement with H&M, which, in turn, applied the negotiated terms and conditions of employment to a bargaining unit that did not yet exist. As a result, the H&M employees were denied their Section 7 rights when H&M, with Teamsters Local 822, denied them of the right to their chosen collective bargaining representative; it also assisted the non-majority representative Teamsters Local 822 and subjected the employees to the terms and conditions of the newly negotiated collective-bargaining agreement. The Section 7 rights of the employees who may not wish for continued representation by ILA Local 1970 are not unduly burdened by the affirmative bargaining order or the bar to raising a question of representation of ILA Local 1970's majority status for a reasonable period of time. "The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation." *Ports America*, 366 NLRB No. 76, slip op. at 5. Only after restoration of the status quo ante can employees have a reasonable opportunity to assess whether they wish to continue their representation by ILA Local 1970 during a period free of H&M's unlawful conduct. Id.

Regarding the second factor, the affirmative bargaining order promotes meaningful collective bargaining and industrial peace, which are at the heart of the Act's policies. *Marion Hosp. Corp. d/b/a Marion Memorial Hospital*, 335 NLRB 1016, 1020 (2001), enfd. 321 F.3d 1178, 1187-1188 (D.C. Cir. 2003). The rationale is explained clearly in *Ports America*, 366 NLRB No. 76, slip op. at 5 [parenthetical substitutions to explain parties]:

> It removes the Respondent Employer's incentive to delay bargaining the hope of further discouraging support for the [charging party union]. It also ensures that the [charging party union] will not be pressured to achieve

> immediate results at the bargaining table following the Board's issuance of a cease-and-desist order to forestall an effort by the [respondent union] to resume its representative status, perhaps with the Respondent Employer's support--or worse, its unlawful assistance.

Regarding the third factor, alternative remedies are not effective in removing the taint of H&M's unlawful refusal to recognize and bargain with ILA Local 1970, its unlawful hiring, and premature recognition of Teamsters Local 822. A cease-and-desist order, without a temporary decertification bar or a bargaining requirement, means little because it would allow a challenge to ILA Local 1970's majority status before the taint of H&M's unlawful refusal to bargain with the ILA Local 1970 and its unlawful recognition of Teamsters Local 822 have dissipated. Id. The result would be horribly unjust in the circumstances of this case because H&M's unlawful conduct likely has caused lasting negative impressions in the bargaining unit and because H&M made clear it preferred representation by Teamsters Local 822. In addition, Teamsters Local 822 has benefited from the unlawful recognition and assistance from H&M since January 2019. Id. These circumstances, created by H&M's unlawful actions, "outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Machinists or any other union." Id. Employees should instead have the right to assess the effectiveness of the ILA Local 822 as their bargaining representative, which requires H&M to bargain in good faith with the ILA Local 822 for a reasonable period of time. *Everport,* supra; *Marion Med. Center*, 335 NLRB at 1020. Therefore, the affirmative bargaining order, with a temporary decertification bar, is required to fully remedy the extensive violations in this case.

Respondent H&M shall be ordered to post the Board's standard notice to employees. Additionally, H&M shall mail the notices to any unit employees it did not employ on or after January 23, 2019, and those who left employment during the period of January 23, 2019 to present. This mailing is required because of the passage of time and because some of the employees who were unlawfully laid off from January 23, 2019 were not rehired and therefore would not see the notices physically posted at the Norfolk Yard facilities, in addition to the relatively high turnover at its Norfolk Yard facility. *Jon P. Westrum d/b/a J. Westrum Electric*, 365 NLRB No. 151 (2017), enfd. 753 Fed.Appx. 421 (8th Cir. 2019), cert denied. __ U.S. __, 140 S.Ct. 2563 (2020).

ORDER

Respondent H&M International Transportation, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from
   a. Telling employees that they will not be hired because they supported unionization.
   b. Refusing to hire bargaining unit employees of ITS, the predecessor employer, because of their union-representation status in the predecessors' operations, or otherwise discriminating against employees to avoid recognition of ILA Local 1970 or to promote recognition of Teamsters Local 822, affiliated with the International Brotherhood of Teamsters.
   c. Failing and refusing to bargain in good faith with ILA Local 1970 as the exclusive collective-bargaining representative of its employees in the

following appropriate unit:

All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics,

excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

d. Withdrawing recognition from ILA 1970 as the exclusive collective-bargaining representatives of the unit employees.
e. Granting assistance to Teamsters Local 822 and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when Teamsters Local 822 did not represent an unassisted and uncoerced majority of the employees in the unit and when ILA Local 1970 was the exclusive collective-bargaining representative of the unit employees.
f. Refusing to hire bargaining unit employees of ITS, the predecessor employer, because of their union-representation status in the predecessor's operations, or otherwise discriminate against employees to avoid having to recognize International Longshoremen's Association, Local 1970, AFL-CIO (ILA Local 1970).
g. Unilaterally changing the terms and conditions of employment of the unit employees without first notifying ILA Local 1970 and giving them an opportunity to bargain.
h. Applying terms and condition of employment of the collective-bargaining agreement negotiated with Teamsters Local 822, or any extension, renewal, or modification thereof, including its dues checkoff provision, to unit employees at a time when Teamsters Local 822 does not represent an unassisted and uncoerced majority of the employees in the unit.
i. Unilaterally laying off unit employees without first notifying ILA Local 1970 and giving them a meaningful opportunity to bargain regarding the decision to lay off unit employees.
j. Discriminating against unit employees in regard to their hire and tenure of employment in order to encourage membership in Teamsters Local 822.
k. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
   a. Withdraw and withhold recognition from Teamsters Local 822 as the exclusive collective-bargaining representative of the unit employees, unless and until Teamsters Local 822 has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.
   b. Refrain from applying the terms and conditions of employment of the collective-bargaining agreement with Teamsters Local 822, including its dues checkoff provision, to unit employees, unless and until Teamsters Local 822 has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.
   c. Recognize and, on request, bargain with ILA Local 1970 as the exclusive

collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics, excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

d. Reimburse all unit employees for all initiation fees, dues and other moneys paid by them or withheld from their wages pursuant to the collective-bargaining agreement with Teamsters Local 822, with interest.

e. Notify ILA Local 1970 in writing of all changes made to the unit employees' terms and conditions of employment on or after January 23, 2019, and on request of ILA Local 1970, rescind any departures from terms and conditions of employment that existed immediately prior to January 23, 2019.

f. Make unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment, in the manner set forth in the Remedy section of the decision.

g. Make all unit employees laid off since January 22, 2019, whole for any loss of earnings and other benefits suffered as a result of Respondent H&M's actions, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses.

h. Make unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent H&M's unlawful failure to hire, in the manner set forth in the Remedy section of the decision, plus reasonable search-for-work and interim employment expenses. The employees to be made whole are: Michelle Clarke; Vernon Cuffee; Darryl Halsey; Carlos Jones; Rayeon Ricks Jordan; Mark Keating;[62] Jamel Christopher Lucas; Michael McManus; Ernest Perry; Earl Smith; and, Ron Spencer.

i. Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

j. File with the Regional Director for Region 5 a copy of the discriminatees' corresponding W-2 form(s) reflecting the backpay awards.

k. Within 14 days from the date of this Order, remove from its files any reference to the unlawful failures to hire and layoffs, and within 3 days thereafter, notify the affected employees in writing that this has been done and the unlawful failure to hire and layoffs will not be used against

[62] Presuming General Counsel is correct that Keating died, his backpay will be tolled at the date of death and his backpay will be paid to his estate. *In re Sumo Container Station d/b/a Sumo Airlines*, 337 NLRB No. 171 fn. 5 (2002); *Reliable Electric Co.*, 330 NLB 714, 727 (2000), enfd. 12 Fed.Appx. 888 (10th Cir. 2001).

them in any way.

l. Within 14 days of the date of this Order, offer employment to the following named former unit employees of the predecessor, and any other similarly situated employees who would have been employed by Respondent H&M but for the unlawful discrimination against them, in their former positions, or if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places. The employees are: Michelle Clarke; Vernon Cuffee; Rayeon Ricks Jordan; Jamel Christopher Lucas; Michael McManus; Earnest Perry; Earl Smith; Carlos Jones; and Darryl Halsey.[63]

m. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

n. Post at its Norfolk Yard facility in Chesapeake, Virginia, copies of the attached notice marked "Appendix."[64] Copies of the notice for the Appendix, on forms provided by the Regional Director for Region 5, after being signed by Respondent H&M's authorized representative, shall be posted by H&M and maintained for 60 consecutive days in conspicuous places, including all places where notice to employees are customarily posted. In addition to physical posting of paper notices, notice shall be distributed electronically, such as by email, posting or an intranet or internet site, and/or other electronic means, if Respondent H&M customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent H&M to ensure that the notices are not altered, defaced, or covered by any other material. In addition, within 14 days after service by the Region, Respondent H&M shall duplicate and mail, at its own expense, a copy of the signed notice all current and former unit employees employed by H&M at the Norfolk Yard at any time since January 22, 2019.

o. Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certificate of a responsible official on a form

[63] According to General Counsel's brief, Mark Keating died while these proceedings were pending and his estate need not be offered employment. Ron Spencer has accepted a position with H&M at Norfolk Yard. Halsey and Carlos Jones left but should be offered positions as part of the remedy for the unfair labor practices as they would be represented by the appropriate union.

[64] If the facility involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Region attesting to the steps that Respondent H&M has taken to comply.

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar it alleges violations of the Act not specifically found.

DATED Washington, D.C., August 27, 2021

Sharon Levinson Steckler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we will not hire you because of your activities in support of unionization while employed by ITS.

WE WILL NOT assist or contribute support to Teamsters Local 822, affiliated with the International Brotherhood of Teamsters or any other labor organization.

WE WILL NOT grant assistance to Teamsters Local 822, affiliated with the International Brotherhood of Teamsters, and recognize it as the exclusive collective-bargaining representative of the unit employees at a time when the Teamsters Local 822 does not represent an unassisted majority of the employees in the unit, and when ILA Local 1970 is the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT bargain with nor apply the terms and conditions of employment of the collective-bargaining agreement with Teamsters Local 822, affiliated with the International Brotherhood of Teamsters, or any extension, renewal, or modification of that agreement, including its dues checkoff provisions, to the unit employees at a time when Teamsters Local 822 does not represent an unassisted majority of employees in the units.

WE WILL NOT discriminate against you in regard to your hire and tenure of employment in order to encourage membership in Teamsters Local 822, affiliated with the International Brotherhood of Teamsters.

WE WILL NOT refuse to hire bargaining unit employees of ITS, the predecessor employer, because of their union-representation status in the predecessor's operations, or otherwise discriminate against employees to avoid having to recognize International Longshoremen's Association, Local 1970, AFL-CIO (ILA Local 1970).

WE WILL NOT refuse to recognize ILA Local 1970 as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT fail and refuse to bargain with ILA Local 1970 as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining units concerning wages, hours and other terms and conditions of employment:

All full-time and regular part-time terminal operators, gate clerks, container and chassis mechanics, and lift equipment mechanics, excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying ILA Local 1970 and giving them a meaningful opportunity to bargain.

WE WILL NOT unilaterally lay off unit employees without first notifying ILA Local 1970 and giving them a meaningful opportunity to bargain regarding the decision to lay off unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold recognition from Teamsters Local 822, affiliated with the International Brotherhood of Teamsters as the exclusive representative of our employees in the unit described above, unless and until Teamsters Local 822 has been certified by the National Labor Relations Board as your exclusive collective-bargaining representative.

WE WILL refrain from applying the terms and conditions of employment of the collective-bargaining agreement with Teamsters Local 822, including its dues checkoff provision, to unit employees, unless and until Teamsters Local 822 has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees and WE WILL refrain from bargaining with Teamsters Local 822 for the employees at Norfolk Yard.

WE WILL reimburse all unit employees for all initiation fees, dues and other moneys paid by them or withheld from their wages pursuant to the collective-bargaining agreement with Teamsters Local 822, with interest.

WE WILL recognize and, on request, bargaining at reasonable times and places and in good faith with ILA Local 1970 as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours and other terms and conditions of employment, and if an understanding is reached, embody the understanding in signed agreements.

WE WILL notify ILA Local 1970 in writing of all changes made to the unit employees' terms and conditions of employment on or after January 23, 2019, and we will, on request of ILA Local 1970, rescind any departures from terms and conditions of employment that existed immediately before January 23, 2019.

WE WILL make you whole, with interest, for any losses sustained due to our unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment.

WE WILL make all unit employees laid off since January 22, 2019, whole for any loss of earnings and other benefits suffered as a result of our actions, plus reasonable search-for-work and interim employment expenses. These employees are: Michelle Clarke;

Vernon Cuffee; Darryl Halsey; Carlos Jones; Rayeon Ricks Jordan; Mark Keating; Jamel Christopher Lucas; Michael McManus; Ernest Perry; Earl Smith; and, Ron Spencer.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and we will file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to hire and layoffs, and WE WILL within 3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful failures to hire and layoffs will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, offer employment to the following named former unit employees of the predecessor, and any other similarly situated employees who would have been employed by us but for our unlawful discrimination against them, in their former positions, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileged previously enjoyed, discharging if necessary any employees hired in their place. The employees are: Michelle Clarke; Vernon Cuffee; Darryl Halsey; Carlos Jones; Rayeon Ricks Jordan; Jamel Christopher Lucas; Michael McManus; Ernest Perry; and Earl Smith.

H&M INTERNATIONAL TRANSPORTATION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1015 Half Street, S.E., Room 5011, Washington, DC 20570
(202) 273-1940, Hours: 8:30 a.m. to 5 p.m.

The administrative law judge's decision can be found at https://www.nlrb.gov/case/05-CA-241380 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.